

THE Constitutional Theory of Hindu Law.

BY *

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PREFACE.

Nothing need be said regarding the utility of a study of the subject herein presented to the public. Any as are the imperfections of the attempt the writer hopes that it will interest the students of Law and Sociology. The references with their translation and the appendices will be issued separately.

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U. K. TRIVEDI.

November, 1913.

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THE CONSTITUTIONAL PRECEPTS OF HINDU LAW.

INTRODUCTION.

I

INDIA has a hoary antiquity. Her literary geology reveals interesting layers of Thought and Life, through which, humanity in this country has been passing these thousands of years. Though we have not enough of what can be strictly called history, our ancient literature contains a faithful record of much that is worth knowing in the life-story of our peoples. From the materials enshrined in that literature Western criticism has constructed a fascinating story of our civilization in all its varied aspects. In the little volume now presented to the public, we have proposed to cultivate our acquaintance with the constitutional aspect of that ancient civilization.

The soul of a community resides in the state and the soul of the state resides in its constitution. In the literature of our country the rules of the constitution, are embodied in the Dharma Sastra; and the present volume brings together a representative collection of precepts bearing on the subject. 'By the constitution of a country is meant so much of its law as rel-

to the designation and form of the legislature; the rights and functions of the several parts of its legislative body; the construction office and jurisdiction of courts of justice." Our attempt covers most of these topics as understood and dealt with in the ancient legal literature of our country.

The interest of the subject is not altogether antiquarian. We have entered on an era of reconstruction of our political institutions, on Western lines. Lest we may not expect too much the question is already asked 'What will one third of India say.' To that 'one third of India', by which I believe was meant, India under Svadeshi Government, the precepts collected in this volume, will serve to remind which way the truth lies.

The precepts collected and elucidated in this little volume are, with a few exceptions, culled out, as we have said above, from the Dharmasastras, by which term we understand the books individually, which collectively are known as the Dharmasastra. And the first question to ask is, what are these books? and what the nature and extent of their authority? They are in their origin, manuals of conduct, first in aphoristic form,

and at a later date amplified in metrical versions, for the use of schools—a body of precepts of great prestige, declaring the rules of conduct for the Aryan population of India. Every student, and, since education was then free, and at least in theory, compulsory, and was undoubtedly at one time largely availed of by all the divisions of the Aryan community residing in India,—we may say, every Aryan, was required, to learn the sutras of his School by heart, and was expected to comport himself accordingly while at school and in after life. They do not purport to be mandates of an individual teacher or thinker, or law-giver, issued at a definite time and place, but they represent the tradition handed down in the family of the teacher from generation to generation and stored up in the memories of teachers and disciples. Of such schools there were thousands in early days. Each school was called by the name of the founder and his lineal descendants and the line of disciples from generation to generation also claimed the name. The schools were meant to concentrate and propound the learning of the Vedas, and their appendages, or, in Indian phraseology, their limbs. Among the founders now known a few are identified with some of the very Rishis who were inspired with the Vedic hymns. Others belong to later times.

The books appear as said above in two forms: the aphoristic and the metrical. The aphoristic is unquestionably the older of the two. Aphorisms on the subject with which we are concerned, were included along with the Srauta and Grihya Sutras, in the Kalpa Sutras, which together recorded the Ceremonial the Private and the Public Law of the Aryan community of India.

Among the Dharma Sutras, the Sutras of Gautama Vasishtha Baudhayana and Apastamba are available to us in their entirety. Besides these we have the Kathaka Sutras remodelled in parts into the Vishnu Smriti. On the basis of such Sutras are compiled the metrical Smritis of which Manu and Yajñavalkya are, for our purposes, the most important. Of these most of the Sutras are unquestionably pre-Budhistic. On the face of them they appear to be spontaneous compilations. Being meant for school-boys, they are largely occupied with details of personal conduct. As the earliest authentic record of Indian polity as taught to young Aryans in respectable seats of learning, they are invaluable. Their genuineness is undoubted, and their authenticity as the source and foundation of later works is never questioned.

A Dharma Sutra opens with an account of the Sources of Dharma. The divisions of

Aryan Society and the precepts on education, the age at which it should begin, the courses of instruction, and rules of school—discipline: these topics follow next. They are further followed by rules of marriage and married life: the modes of living for the Brahmin, the Kshatriya, the Vaisya and the Sudra, and also the mixed classes—for there were many of them even in those early days, are next dealt with. The duties of the Kshatriya take the Sutra-writers into the field of Politics; and the qualifications of the King, and his duties towards his subjects, the appointment of ministers and their qualifications, the sources of public revenues and the mode of their disbursement, rules of war, and the administration of justice: these topics follow in due course. The last of these gives them the occasion to expound the Civil and Criminal Law of the community, together with the constitution of the Courts of Justice and the rules of procedure. Then follow lists of sins, the way in which society should deal with, the breakers of Law, and, penances; and rules of life in old age: all, in a general manner, but omitting no detail of importance. The order of topics is not the same in all the Sutras but they are all of them there in large or small. They sketch, so to say, a more or less complete map of Aryan life, for

the individual both as an individual and as a member of society. Woman has a separate chapter devoted to her in some of these Sūtras. We need only transpose a few of these topics and arrange them in the style of a modern book, to recognize in them, the ancient prototypes of modern manuals of the Laws for Life.

This character of the DharmaSāstras is better illustrated in the metrical smritis, of which, we have got two only, bearing the hallowed names of Manu and Yajñavalkya, in their entirety. It has been inferred on very good grounds that they are amplified versions of one or the other of the Dharma Sūtras; amplified and revised, I should have said. And, the most interesting question for a modern student of the DharmaSāstra is, what was the occasion for constructing them in the form of separate systematic works, and what were the reasons for presenting them with their peculiar preambles and perorations.

In his introduction to the translation of the 'Laws of Manu in the Sacred Books of the East series, Dr. Bühler has raised similar questions, and offered solutions which *prima facie* appear acceptable. There is no doubt that with the growth of Vedic literature, specialization of study must have come in

vogue, and it may have been thought expedient to collect and consolidate into regular treatises all those different branches of learning, which existed previously, in the manuals intended for schools only. Grammar, Astronomy, Etymology were so separated and systematized, and the Dharma Sastra must have been submitted to the same operation. When this occasion arose the leaders of the day might have thought it advisable to bring together all that body of floating literature which was existing at the date in the memories of men, in aphoristic or metrical form. The sutras themselves bear evidence of the existence of metrical precepts of earlier date, relating to the same topics, A perusal of the preamble of the Laws of Manu, would lead one to theorize that Bhṛigu's might have been the first edition of a consolidated Dharma Sastra. And, since Manu was by a universally accepted tradition the first semi-divine king and since the collection was not meant to be anything beyond a codification of the Dharma Sutras and floating texts existing at the date, Bhṛigu should have felt no scruples in giving the name of Manu to his collection. Dr. Bühler in giving an additional reason as to why the name of Manu was given to the collection, brings forward the inference that the Manava Dharma

Sastra was an enlarged and metrical version by some student of the Manava Dharma Sutras, which, though not yet recovered are proved to have existed as the Sutras of a School of Yajurveda.

But the questions remain: Why was the metrical form adopted? Why this particular attention to publish it under the best auspices? Why that vigorous self-assertion which we find both in the pre-amble and in the peroration? Why this effort at presenting a full scheme of life, with a guaranteed promise of happiness here and hereafter? Several considerations offer themselves to supply the answer. Between the time of the Sutras and the metrical Smritis, the Aryan population had expanded far and wide; even some of the Sutras bear evidences of such an expansion. The process of Aryanization which had been begun, must have been brought to a definite pitch, and what with local expansions, what with the assimilation of Non-Aryan population, and what with the increasing interest in worldly pursuits, consequent upon the increasing complexity of a growing civilization, the interest of the Aryan population in Vedic schools and Vedic literature must have reached a rather discouraging level. With the complexity of life thus introduced some heretical systems of thought and life had also sprung

into existence. The apprehension due to the combined operation of these centrifugal forces may have afforded the motive for the construction and publication of Bhrigu's code of the Laws of Manu. To the last of these causes must be due the peculiar form as well as the peculiar tone and garb. We can well imagine the sturdy Brahmin, setting unto himself, the task of weaving, the scattered Sutras and floating precepts, couched in cryptic, and even at that time, archaic language, into a popular treatise, in the language understood of the people, and in the metre easily committed to memory. Bhrigu's code would appear to be the first vigorous attempt at consolidating Aryan society subjected to a variety of disintegrating forces; and to have for its immediate object an emphatic, though politic, re-affirmation of the cardinal principles of Vedic polity.

It is impossible to say at what stage in the progress of these various forces the consolidation of the Dharmasastra was attempted by Bhrigu. Whether the metrical superstructure was raised on the foundation of the Manava Dharma Sutras or not, the introduction of the code with the hallowed name of the progenitor of Mankind, Manu, had a great

purpose. His high authority could not have been invoked without adequate grounds. 'Manu II, 11, and XII 95, 96 distinctly point to the existence of a sincere apprehension of religion in danger, brought about by the threatened penetration of heretical opinion, and lends a substantial support to the view offered above. No consolidating measure which was without the prestige of high authority and unattended with vigorous self-assertion combined with conciliation, could have met with any success.

If Bhrigu's code of the Laws of Manu was called into existence to meet the demand of an impending crisis, Yajnavalkya's laws appear to have been called out in better and cooler times. It would appear to be a revised-edition of the DharmaSastras; revised and, not enlarged, but rather condensed, further systematised and brought up to date. There are some fundamental differences of opinion between Manu and Yajnavalkya on some

1. Every twic-born man who relying on the Institutes of Dialectics, treats with contempt those two sources (of Law) must be cast out by the virtuous as an athiest and a scorner of the Veda. Manu II 11.

All those Smritis and all those despicable systems of Philosophy, which are not based on the Veda produce no reward after death; for, they are declared to be founded on darkness. Manu XII 95.

All those (doctrines) differing from the Vedas which spring up and soon perish are worthless and false, because they are of modern date XII 96.

vital points and those who still follow Manu on those points in preference to Yajñavalkya venture so far as to say that the Dharma Śāstra of Yajñavalkya was conceived under Buddhist influence. Weber has even hinted that the writer of Yajñavalkya was a Buddhist teacher, and Mr. Kishorilal Sarker gives a similar character to the author of the Mitakshara. Whatever the truth, there is no doubt that Yajñavalkya's code was somehow a book which supplied a real want and was accepted as authoritative all over India, including even Bengal, where it required the gigantic efforts of Jimutvahan to displace him. The authority of Yajñavalkya was further strengthened by the admirable commentary of Vijnaneshwar, the Mitakshara, who was, like Yajñavalkya, an ascetic belonging to the fourth order, and if tradition is to be credited, an occupant of one of the four cardinalships inaugurated by the great Shankaracharya. The fact that everywhere except in Bengal, Yajñavalkya is the final authority is itself evidence that it either reflected the existing practice and opinion faithfully or that his digest was framed with due regard to the existing tendencies of the large mass of the Aryan population of the time. Yajñavalkya's Dharma Śāstra, it may be said, is again a code edited by some leading author who may have based his ver-

sion on the Vajasaneyi Sutras, and having the example of Bhrigu before him, given it a wider scope and venerable character by attaching to it the name of the renowned Yogin.

We shall notice two more Smritis in this general outline, Narada and Brihaspati. Narada is later than Yajnavalkya. As now extant, it gives us only the Vyavahara chapter. The practice of separating Vyavahara inaugurated by the compiler of Narada might have been the result of abatement of interest in the other two branches of the Dharma Sastras; or, the compilation of Narada might be belonging to that period in the history of India when Buddhism had swept away every thing Vedic except the civil law which it does not appear to have touched. Vyavahara, thus separated, specialised, and secularised ceased to have that intimate connection with the general rules of life and conduct of which it was an integral part. Detached from the ceremonials the Vyavahara naturally took a secular turn with which the mass easily acquiesced. To Narada we shall look for the Vyavahara branch of Dharma for the period since Yajnavalkya. The name of Brihaspati is familiar to us only by quotations. From the different fragments of this author brought together artificially, there emerges a regular

treatise on Vyavahara much after the model of Manu. It is difficult to ascertain the period of this Dharma Sastra with any approach to certainty; but it appears to be an old and detailed statement of Dharma, whose authenticity is as high as Manu's. Tradition understands both Narada and Brihaspati to be versions of some old Manu Smriti, Bhrigu's, now known as Manu Smriti being one of such versions.

Achara, Vyavahara and Prayaschitta are the three main topics with which the Smritis deal. In Manu and Yajnavalkya we have complete pictures on all these matters for the period to which they belong. Yajnavalkya practically rules to this day. Narada and Brihaspati largely supplement Yajnavalkya on various topics. They are both profusely quoted in their commentaries of Yajnavalkya both by Apararka and Vijnaveshwar.

A word may be here added about Parashara Dharma Sastra. It is the Smriti of the present Yuga (the Kali Yuga), and it has a value of its own in those matters on which it speaks. But on matters with which we are concerned it says little. And, as a Sastra for the age of decadence its ideals are not supposed to be of the highest.

A word about the dates and we have finished with this section. It is useless to attempt to define dates. The whole subject

of dates regarding Sanskrit literature is still in an undetermined condition. This much however is certain. The Sutrās are pre-Budhist. Manu is pre-Budhist or to give the latest limit, contemporary with the rise of Buddhism, and marks the time of the first reaffirmation of Aryan polity, the consolidation of Aryan Society and conciliation of the Non-Aryan. Yajnavalkya, and Narada belong to the period of our peaceful co-existence with the Buddhist and other non-vedic systems. Of Brihaspati nothing can be said with certainty.

II

Dharma is classified by the commentators into Varna-Dharma, Ashrama Dharma, Varnâshrama Dharma, Guna Dharma, Naimittika Dharma and Sâdhârna Dharma.

Although mentioned last in the divisions of Dharma by the commentators the Sâdhârana Dharma deserves the first place in the studies of the modern student of the Dharma Sastras. If we were to follow the method of division by dichotomy, we should certainly divide the Dharma first into Sadharana and Asadharana and further sub-divisions of the Asadharana Dharma would yield the other classes of the commentators. The Sadharana Dharmas are but mentioned in a passing manner by the Sutra-writers, and

although a place is given to them in the metrical Smritis, you do not find any attempt at expounding or illustrating the various ideas. The commentators have filled the gap somewhat, but even they have not given half the attention to them that they give to the other divisions of Dharma. It may be mentioned however, in a general way, that they were looked upon as a matter of individual self-discipline, to be practiced rather than taught.

But we must go on with the position of the Dharmasutras in respect of the Sadharana Dharma. Vasishtha is the first writer to mention them specifically.¹ Vasishtha IV-4 says "Truthfulness, freedom from anger, liberality, abstention from injuring living beings and the procreation of offspring are obligations common to all" ²Baudhayana mentions Truth as the virtue which purifies the mind. The text of ³Vishnu gives a more detailed account of Sadharana Dharma, and the place which it gives to it is quite remarkable. After mentioning the Varnas and the general obligation of each of them, he says "Forbearance, veracity, restraint, purity, liberality, self-control, non-injury to any living being, obedience

1. S. E. Vol. XIV p. 26.

2. Baudhayana I. 5-8-2 S. E. Vol. XIV p. 155

3. Vishnu II. 16-17 S. E. Vol. VII 15.

towards one's Gurus, visiting places of pilgrimage, sympathy with the afflicted, straight forwardness, freedom from covetousness, reverence towards gods and Brahmins, and freedom from anger: these are the duties common to all classes." Whether these verses of Vishnu are a later addition or a citation from some old author it is impossible for us to say. But there they are and it is remarkable that they are given the prominence which they deserve. Gautama mentions some of these virtues as the virtues of the mind, and thinks them essential for the Brahmin who shares with the King the vow of upholding the moral order of the Universe. And, such indeed is the combination. Apastamba's Dharma Sastra mentions Asadharan Dharma but in a somewhat out of the way but highly remarkable context. Apastamba Prashna I Patala 8 Khanda 21, completes the rules of life for the Brahmin householder. Khanda 22 then ordains that, he shall follow the spiritual Yoga, for there is no greater gain than the recovery of the spirit. The next Khanda continues the same subject, and Sutra 5 enumerates the faults which burn the spirit, so to say, and the annihilation of which is the way to welfare. ⁵These faults are' anger, exultation, grumbling

4. Gautama VIII 22-23 S. E. Vol. II p. 45.

5. S. E. Vol. II p. 77.

and coveteousness, perplexity, doing injury to anybody, hypocrisy, lying, gluttony, calumny, envy, lust, secret hatred, neglect to keep the senses in subjection, and neglect to concentrate the mind'. The Sutrakâra here expresses the opinion that their eradication is brought about by Yoga, and continues:—

“Freedom from anger, from exultation, from grumbling, from coveteousness, from perplexity, from hypocrisy, and freedom from hurtfulness; truthfulness, moderation in eating, silencing slander, freedom from envy, distribution of wealth, self-sacrifice, uprightness, affability, extinction of the passions, subjection of the senses, peace with created beings, concentration of the mind, regulation of one's conduct according to that of the Aryas, peacefulness and contentedness: these good qualities have been settled, by the agreement of the wise, as good for all orders. He who according to right procedure follows these, enters the universal soul⁶.”

We have thus statements of Dharma applicable to all and we see in them an emphatic insistence upon moral excellence, which is after all the supreme purpose of human life.

We have done the Sutas, and will now

turn to the metrical Smritis. From Manu we take two statements: first⁷, (X. 63.) where the five cardinal virtues (of Abstinence from injury to creatures, veracity, absence of violation of private property, purity, and control of the senses) are declared to be the Dharma, law, in a nut-shell, for all the four *varnas*; next,⁸ (VI, 92.) at the end of the duties of the householder, where, 'contentment, forgiveness, self-control, abstinence from unrighteously appropriating anything, purity, coercion of the organs, wisdom, knowledge, truthfulness, abstinence from anger; these are declared to be the ten-fold expression of Dharma.

Yajnavalkya's statement is more general and simpler. In⁹ 1-122 he includes the first five members of Manu's dictum, and adds 'liberality, self-restraint, mercy and forgiveness': 'these' he says 'are the means of earning Dharma, for all',—including the Chandal as explained by Vijñāneshvar.

These have their exceptions. The Sūtras and the commentators do not omit to mention them. Injury in pursuance of a Vedic injunction is not A-Dharma, for instance. But opinion has triumphed over Vedas in this

7 S. E. Vol. XXV p. 416.

8 S. E. Vol. XXV p. 215.

9 Mandlik's *Hindu Law* p. 177.

case, and the exception is not now universally accepted. The Smritis also recognize the right of private defence, for, there, as Vasishtha declares,¹⁰ "He who slays an assailant does not kill, for in that case fury recoils upon fury."

This will do, for our present purpose. This aspect of DharmaSastras is now entirely neglected. We have professors of Dharma who will talk for hours on the laws of Prayaschitta but we shall rarely find one among them, perfectly familiar with the deeper shades of the obligations of Sâdharana Dharma. These involve ideas which require no small amount of thought and learning to elucidate, and there are positions in respect of them which require careful consideration. In all future studies of the DharmaSastras the student would do well to bring home to himself the importance of the theory, and the details, of the Sâdharana Dharma. It is quite essential also to develop and perfect the study of this branch of the Dharma Sastras and bring the doctrine of 'saving the Spirit' in a line with modern ideas and theories. The ideas involved in Sâdhâraṇa Dharma are universal and universally true. But humanity is a large unit, and has undergone numerous experiences under a large variety

of internal equipment and external circumstances. Its members, are not at peace with each other. People have fallen into associations large and small and some of our highest ethical ideas have to be limited or sacrificed in the permanent interests of those associations. And, to what extent, are these limitations permissible and these sacrifices justifiable, and to what end and for what associations: there are questions of ethical importance which have to be considered with special reference to the conditions prevailing in India.

III.

The basal idea of our ethical system is Individualism of that higher type which aims not solely at the material happiness of the individual while on this earth, but seeks also to secure his happiness in the hereafter; which in its higher aspects, signifies the true realisation of the spiritual Self as the ultimate goal of man's being. As pointed out by Âpastamba man's life is attended with certain drawbacks which burn the spirit out of him, and the eradication of these drawbacks is seriously recommended for all. Yajnavalkya I-8 after mentioning sacrifice, good conduct, self-restraint, non-injury, liberality and studies, recommends

‘the realization of the Self by means of Yoga’ as the highest Dharma. With this aim in view, our institutions were so shaped as to reconcile the social duties of man, with his individual ideals. Our problem would appear to be how to reconcile the higher Individualism with the material needs of Man, on the one hand, and the claims of Society, on the other: and the solution was found in the Socialistic Individualism known as the Varnâsrama Dharma. The material Individualism was to be subdued by persistent attention to the hereafter, and the claims of society were to be met by a system of institutions which placed on the individual, social duties and personal restraints, which provided for the individual, recurring occasions for the exercise of those virtues which tend to save the soul, and sought to reduce the narrowness of Individualism, however high, to a minimum. Its beneficent effects reached the mutual relations of the various classes in the broad field of humanity, and as economic units, kept its votaries at perfect peace with each other and with the outside world. The structure of Hindu Society and the conception of Dharma postulate the economic differentiation of population into the Brahman, Kshatriya, Vaishya and Shudra classes; and the Varna Dharma are the rules for the observance of the members of

these classes, as such members, individual considerations playing a very subordinate part. For the development of the individual however, they have ordained what is generally known as the four Ashramas: the Brahmacharya or the studenthood, the Grihasthâshram the order of the householder, the Vânaprastha or the order of the Hermit, the Sannyasa or the order of the Ascetic. The first is for study, where-in, over and above the general education, the Aryan is taught the duties and requirements of his particular profession, and the law on this point consists mainly of rules of school-discipline. The Grihasthashram rules embody duties appertaining to family life, the rules of marriage, of the professions which the individual is to follow, and the rules of daily life, besides all those rules and ceremonies which have a bearing upon religious spiritual and ethical exercise. Then follows the hermit's life which is more or less preparatory to the final stage of absolute asceticism. Under asceticism over and above the rules of life in that order is generally included those philosophical doctrines which supply the ultimate motive of life and life-work. These exhaust the Ashrama Dharmas. Then follow the Varanashrama Dharmas which give the distinguishing features for the various Varnas

in the same Ashrama. It would appear that at the time that the differentiation of functions was found expedient, the truths of heredity were largely understood by the leaders of the Aryan society in India, and in giving the fullest scope to the principle in human society, they saw their chance of a perpetuation of unerring propensities and valuable aptitudes. Therefore, having conceived an occupational division of society into the literary, the military, the industrial-higher, and the industrial-lower classes, the seers of the day adopted the hereditary or the eugenic principle for the specialization and perpetuation of the respective functions and aptitudes of the various classes. The first thing they did, was then to declare that, birth was the major factor in man's life. 'Birth must be' they said in effect, the determining factor in the aim and purpose of life, and environment and education may, can, or must be made to suit the aptitudes acquired by birth.' And the desire to maintain a practically homogeneous environment would appear to lie at the root of those characteristic restrictions on occupational freedom and domestic intercourse which form the distinguishing feature of Hindu society.

The main Dharma of the Brahman was thus put down to teach the Vedas; of the Kshatriya

perpetual preparedness for armed fight; of the Vaishya the pursuit of agriculture and commerce; and of the Shudra service and pursuit of the various arts and industries: and their modes of livelihood were ordained to be, for the first, to sacrifice for others and receive alms; for the second, to protect the world and receive taxes in consideration thereof; for the third, agriculture commerce and industries, and also, money-lending, and for the last, the minor arts and industries. And it was generally provided that each Varna may in times of distress follow the occupation of the one next below in rank. In the expression restrictions on domestic intercourse I mean to include those well known restrictions on interdining and intermarriage which seriously agitate the Hindu mind at the present day.

The scheme here outlined, would appear to be due to the condition of society in which it was the aim of the leaders of the day, (1) to organize the commonwealth so as to evolve a unity in the face of diversities of race and interests; (2) to consolidate the professions into the hands of homogeneous classes and regulate them in such a manner as to secure co-operation and efficiency; (3) to minimise the evil of undesirable competition between the most powerful classes of the Aryan Community of the times on the one

hand and its proletariat on the other; and (4) to admit the non-Aryan and other heterogeneous communities which had accepted the Aryan domination to a peaceful participation in the economic life of the commonwealth; and, lastly, (5) to do all that in such a manner as to promote the best and the truest interests of the Individual as well as the Society. The position of the Shudra does not appear satisfactory at first sight and at this distance of time; but it will be easily intelligible if we bear in mind the social problem of the day. The Shudra was supposed to be not the equal of the Aryans in point of intelligence, and culture, and not possessing the character capable of undertaking and carrying through independently, the work which the Aryan civilization brought in its train. He was, therefore, asked to place himself in the service of the other three classes to serve that apprenticeship which every community is obliged to serve in order to furnish itself with the capacity for those occupations in which some of those qualities which are acquired only by long experience are necessary. The prohibition to wear arms, would appear to be the ancient counterpart of our present law rendered necessary in Post-~~Frontier~~ days to bring about a regime of peace and

progress. Learning the Vedas was prohibited to the Shudra partly in the interest of euphonic purity, partly owing to his inability to understand the language and retain the Vedas in memory, and partly owing to the fact that the Shudra was not particularly friendly to the Aryan Community at that early period. As however the Shudras became more and more assimilated to Aryan life, all Sanskrit literature was thrown open to them, and all Applied Science was placed at their disposal. Nay, the growth of Itihasa and Puranas may be traced to the desire of the scholars of the period to place the treasures of Brahmanic thought at the disposal of the classes to which Veda was prohibited. The Kshatriya was prevented from competing in the professions, for, professions supported by arms would be simply tyrannical in the first instance, and occupations of peace once freely indulged in would necessarily incapacitate the community from following the risky vocation of armed life. And the Brahmin was prevented from competing not only with the Vaishyas but also with the Kshatriyas in the belief that learning and character would otherwise suffer.

The Guna Dharmas follow next. They relate to the duties of particular offices, such as

the duties of the King on whom अभिषेक (the bath of consecration) conferred certain obligations which otherwise would not devolve on him. The duties of the king as such would devolve upon any one whether Kshatriya or not when called to the office of Kingship, acceptance of which would be marked by submitting himself to the ceremony of the bath in which the entire community, including the Shudra also, was required to take part. Then follow the Nimitta Dharma or consequential duties, duties for instance, of penance, consequent upon sins of commission and omission of duties which must be performed on certain occasions.

We see thus that the scheme of life and occupations propounded in the literature under notice, is more or less intended to cultivate the social conscience of Man. The individual is considered as belonging to some group and having some special position in relation to society. The scheme taken as a whole covers every phase of the life of an individual. In studenthood as the student his duty it is to acquire learning and to habituate himself to a life of self-discipline. The Grihasthashrama with its life of personal discipline and social duties extending from the family to his class, neighbourhood or profession, to the other classes as also to the state and to

humanity and also to the animal world, is the maintay of Aryan polity. In that Ashrama the individual is under the obligation to be the producing unit of society and produce enough to be able to distribute his quota among his fellow-men of the non-producing orders. The last two Ashramas form the Sabath of Aryan life for the satisfaction of those higher cravings which every one feels at one time or the other of his life. The individual shall not remain a slave of society, all his life. On the contrary, he will be at liberty in the last stages to pursue his own spiritual good in the most selfish manner possible. Every iudividual shall have his Sabath. He may cut himself partially in the third, and completely in the fourth, order, from concerns of the world. Looked at from another stand-point the institution of these Sabaths, afforded the provision of the very vital principle of Social dynamics, of making room for the younger and the more vigorous members of the community in the affairs of the world. In this way the ancient polity sought to adjust the mutual claims of the individual with the Society. The individual was to be subservient to the society in the Grihasth-ashrama; the Society was to be the support of the individual in old age.

IV.

The Hindu State is thus to be looked upon as the Political Personality of the community so unified in aim and so diversified in pursuit; organized as a co-operative Commonwealth and divided into self-legislating and self-governing groups, with the Brahmin as the leader in the realm of Thought, and the King as Protector and Chief Magistrate. When and how the Aryan colonies in India accepted the monarchical principle in the organization of the State, and when and why they introduced systematically the dual control of Opinion and Law, is a problem which for India can only be answered by conjectures. This much however can be said with certainty and on the strength of the most reliable literary evidence, that there had been Kings and Emperors in the Punjab as well as in the valleys of the Ganges, long before the advent of Budha Gautama, the point of time in our life at which chronological sequences emerge into historical certainties. The Buddhist records "compiled probably in the fourth or fifth centuries B. C." and "looking back to an older time enumerate sixteen (of some independent) states or powers (some monarchies and some tribal republics) extending from Gandhara on the extreme North-west of the Panjab the modern districts of Peshavar

and Rawalpindi, to Avanti or Malva with its capital Ujjain".* The same records make it clear that side by side with powerful monarchies there existed republics in our country with either complete or modified independence during the early days at any rate of Budhistic influence. Unfortunately for us our information in reference to these republics is altogether meagre and fragmentary. We know this much however that the administrative and judicial business of the republican clan was carried out in public assembly at which young and old alike were present in their common Hall. But even in these clans, a single chief was elected as Office holder, presiding over the sessions of the clan in the Mote Hall, and if no sessions were sitting, over the state. He bore the title of Raja which must have meant some thing like the Roman Consul, or the Greek arcon. The Mote Hall was a common feature not only at all principal towns but all important places had such halls or pavillions covered with roofs but without walls in which public business was conducted. The local affairs of each village were carried on in an open assembly of the house-holders, held in the groove which, then as now,

* Vincent Smith's Early History of India, Second Edition, p. 23-24.

Rhys Davies Buddhist India, p. 19.

formed the distinctive feature of village life. The villages were grouped round corn-fields, and the cattle wandered through the outlying forests over which the peasantry had rights of common. The jungle was infested from time to time with robbers but there was not much crime in the villages themselves, each of them a tiny self-governing republic. The central authorities were served by a special body of peons or police, distinguished as by a kind of uniform. Criminal Law was administered by a succession of regularly appointed officers, Justices, Lawyers, Rehearsers of the Law-maxims, the council of representatives of the clan, the General, the vice consul, and the Consul himself, and 'punishment was awarded according to the Book of Precedents' The village was a perfectly organized economic unit. *The inhabitants had a sufficiency for their simple needs; there was security, there was independence. There were no landlords and no paupers. There was little of any crime. "When the central power was strong enough, as it usually was, to put down dacoity, the people, to quote the quaint words of an old Suttanta 'pleased with one another and happy, their children dancing in their hands, dwelt with open doors.' "

* Bhudhist India, p. 49.

There is no doubt, then, that the monarchical principle was early introduced in India, as early as the period of time which the Vedic hymns chronicle, thousands of years ago; with a simple but effective administrative system, the village being the unit, and popular juries forming the commonest element in the judicial administration. The principle it also appears to be clear, was a growth from a popular system in which all classes of the community had their share; the King regulating the conduct of Public business much like the President of a State-Committee. There is evidence also that the monarchy such as it was, was at one time elective. 'The people elect you to rulership' [Atharvaveda iii. 1, 4, 2.] and the solemn ceremonial of the coronation of the King even to-day requires the concurrence of all classes of the community. Of course to-day it is only symbolical, but its incorporation as an essential element in the religious ritual has a vital significance as to the true origin of the title of the King.

V.

Further. It appears from a passage in the Mahabharata that kingship also had its share of rationalistic examination. "Why" asks Yudhis-thira (Shantiparva chapter LI X.) "Why does

the man, having hands and arms and neck like others, having an understanding and sense like those of others, subject like others to the same kinds of weal and woe, having back, mouth and stomach similar to those of the rest of the world, having vital fluids and bones and marrow and flesh and blood similar to those of the rest of the world, drawing in and sending out breaths like others, possessed of vital airs and bodies like other men, resembling others in birth and death; in fact, similar to others regarding all the attributes of men, why does the man, whom they call 'King' govern the rest of the world consisting of many brave and intelligent persons? Whence is it that one man governs the universe consisting of brave, energetic, well-born and well behaved men"? The answer of Bhishma is three fold: the Divinity of Kingship, the possession by the king of the physical, moral and intellectual attainments, required to uphold the high dignity of the office, and good conduct. "At first" says he in answer, "there was no sovereignty, no king, no punishment, no punisher. All men used to protect each other piously." In course of time however they found the task to be painful and error crept into their hearts. With error came the passions, and off went all sense of the distinction of Right and Wrong. And, "When this con-

fusion set in," the narrative proceeds "the Vedas disappeared, and righteousness also was gone." The gods, then, overcome with fear, appealed to God Brahman, and Brahman proceeded to give them a book on the subjects of 'Religion, Wealth, Pleasure, and Liberation.' For the contents of the book we cannot find room here. After finishing his volume, consisting of one hundred thousand verse, Brahman proceeded to create the King. The first fruit was not a happy one. King Vena a slave to passions proved a tyrant; and King Prithu was then created to take his place. "Clad in mail, armed with sword bows and arrows and well-versed in the science of war, he was also a master of the Vedas and its auxiliaries and all the ordinances of the science of politics came in their bodily form to that best of men." Then addressing the gods and Rishis present, Prithu asked, "I have got a very keen and fair understanding. Tell me fully, what I shall do with it. I shall unhesitatingly accomplish any useful task which you will be pleased to indicate." Thus addressed the gods asked the following characteristic questions:—"Do you fearlessly perform all sorts of righteous works? without caring for what you like and what you do not? Do you regard all creatures, with impartiality? Renouncing lust, anger,

coveteousness and self-opinion, and always following the dictates of righteousness, do you punish with your own hands, the man, whoever he may be, who does not perform his duty? Do you also swear that you would in thought, word and deed, always maintain the religious law laid on earth by the Vedas? Do you also swear that you would fearlessly follow the duties laid down in the Vedas with the help of the science of politics and that *you would never act copriciously*? Oh powerful one! know that the Brahmins are exempt from punishment, and promise further that you would protect the world from an intermixture of castes". The promises having been taken, his ministry is formed, and Prithu is crowned King. The great king caused all creatures to consider righteousness as the foremost of all things and because he pleased all his people he was called Rajan, and because he also healed the wounds of the Brahmins he was called Kshatriya, and because the earth (during his reign) became celebrated for the practice of virtue therefore she passed by the name of Prithivi. The eternal Vishnu himself confirmed his power telling him 'no one, Oh king shall excel you.' Then winding up the story, Bhishma observes, 'Established by the gods no one goes above him. It is therefore that every

body obeys one, and that the world cannot command him." That is one aspect of the answer. The others are equally clear. "Good acts Oh king lead to Good. It is therefore that a great many obey his command, though he belongs to the same world, and is possessed of similar limbs." The story has thus a positive significance which cannot be mistaken. The discussion thus initiated is followed up by a complete exposition of the science of Politics, which we can do no more than mention in this place. It may be mentioned however that the King is accorded a definite place, and that place a high one, in the organization of society, which went forward with the object of achieving not Religion alone, nor Wealth alone, nor Pleasure, nor even Liberation alone; but all in their proper sequence, in complete harmony with each other, culminating in the highest good both for the individual and the society, of which the King was constituted the Responsible Protector on Earth.

VI.

The reader will observe that the King was constituted to meet a certain contingency; he was constituted because man fell from the high standard of conduct which, according to story here narrated, at one time prevailed among the people all protecting one another

out of pure piety. It is quite open to us to construe the story into the statement that what was at one time, anarchical autonomy, was brought under a monarchical system although, by what steps, it is not easy to say. Understanding by the regime of piety, the regime of self-adjusting relations requiring no punishment and no punisher, the regime, in the language of historical politics, of tribal or local self-government, it is open to surmise that such a system was under stringent necessity superseded by the initiation of a monarchy: which, though established by the gods depended for its existence, upon proper culture and good acts and upon these alone. And it would not be too much to say that the peculiar importance attached to local sectional and group-opinions and the recognition of private legislation direct and indirect (in the form of local and tribal and other customs) are both indicative of the existence of a strong republican foundation on which the monarchy was constructed only as a superstructure; and indicative also of the desire of the builders of the day to retain the whole of the republican foundation for the smaller units of society and of administration, and add only the necessary quantum of the monarchical element, in order to set right

matters that may go wrong under the influence of the ever persistent aberrations of the human mind, individual as well as social. The King was not to be an autocrat. He was to stand by the literary classes and by the literature of the country, and above all was not to *act capriciously*: these were the promises taken from Prithu before his coronation as the story plainly shows. In another legend (Shanti Parva Ch-91) noted in Chapter I below, we find that the king was instituted to enforce the laws first made by the people themselves: and we find the same note in the texts collected in this volume insisting upon the king to recognize and adopt the local tribal sectional and trade laws made by the people themselves for regulating their own conduct. Even in the matter of adjudication the private tribunals had also had accorded to them a measure of authority which cannot be explained except on the hypothesis of a republican foundation. The monarch in India is thus, in the strictest sense the Last Magistrate in peace, though the first General in war: and never had, at least in early times, any of the unbounded powers of legislation taxation and adjudication which the representatives of ancient Indian dynasties have during comparatively recent times arrogated to them.

selves. Whence and how these high powers came to be claimed by the heads of Hindu States and how has it affected the general wellbeing of the people: these and other questions relating to the constitutional usages of the Hindu State, the writer must reserve for a future occasion, content, at present, with the hope that the view here put forward will be found to be supported by the texts brought together in this collection.

The Constitutional Theory of Hindu Law.



CHAPTER I.

THE KING AND THE LAW.

I. SOME CORONATION HYMNS.

Ref.1. Rigveda X 173 is a Coronation hymn which runs as follows:—

1. Oh king ! I bring thee to the station of a king. Be thou the Lord of the country. Be immoveable and fixed ! Let all thy subjects cherish thee. Let not thy kingdom be destroyed.

2. Remain here as fixed as the mountain : do not be dethroned ! Remain fixed like Indra, and support thy kingdom.

3. Indra has received the sacrificial offerings and supports the newly coronated king ! Soma blesses him.

4. The sky is eternal ; so are the mountains ; and the Universe. So too is he eternal who is a king among his subjects.

5. May king Varuna make thee immoveable ; May the good Brihaspati make you immoveable ; May Indra and Agni support you and make you immoveable.

6. See! I mix these immortal offerings, with the immortal Soma; Indra has brought you subjects under your rule, and made them willing to pay you revenues.

The above distinctly shows that kingship in India is as old as the Vedas; that a formal ceremony of coronation was in vogue much like the coronation ceremonies of modern times, and, that it was meant to confer a dignity much higher, as it does to-day, than the dignity of a mere tribal chief or patriarch.

Rigveda IV 4, 1 contains an allusion to a king riding elephants with his ministers, a practice which persists to this day in Hindu States. The mention of ministers postulates some sort of administrative organization even at that early period.

2. The Vajasaneyi Samhita contains another coronation hymn which gives a somewhat deeper glimpse of kingship. Here it is.

“May God who rules the world bestow on you the power to rule your subjects. May Fire worshipped by Householders bestow on you supremacy over the householders.”

“May Soma, the Lord of Trees, bestow on you supremacy over the forests. May Brihaspati, the Lord of Speech bestow on you supremacy in Speech. May Indra, the High-

est among Gods, bestow on you the highest Supremacy. May Rudra, the cherisher of animals, bestow on you supremacy over animals. May Mitra who is 'Truth, make you supreme in 'Truth. May Varuna who cherishes holy works, make you supreme in holy acts". IX 39.

And the same hymns expound the duties of kings in words which lay the true foundation of the Science of Government.

"If thou shalt be a ruler, then, from this day judge the strong and the weak with equal justice; Resolve on doing good incessantly to the public, and protect thy country from all calamities". X 27.

The following in Rig VII 104 is also to be noted as supplying the motive for good conduct. We have seen that gods are invoked to support the king in his high office. When do the Gods withdraw their support?

"Soma does not bless the wicked; nor the ruler who abuses his power."

So far we have arrived at a statement of the fundamental principles of Indo-Aryan politics during the period which the Vedas illuminate. We have the king and his subjects, his ministers and his taxes: and the passage in the Vajasaneyi Samhita points to the organization of a few departments of peaceful government

Brahman as his source. He who injures him injures his own source. He becomes worse because he has injured one better than himself.

"It did not progress. It created the people, the classes of Devas which in their different orders are called Vasus, Rudras, Adityas, Visve-Devas, Maruts.

"It did not progress. It created the Sudras as Pushan (the nourisher). This earth verily is Pushan for the earth nourishes all this.

"It was not strong enough. It created still further the most excellent Law (Dharma). Law is the Kshatra of the Kshatra, (the king of kings) therefore there is nothing higher than the Law. Thenceforth even a weak man rules as though with the help of the Law as with the help of a king. Thus the Law is what is called the True. And if a man declares what is True, they say he declares the Law; and if he declares the Law, he declares what is True. Then both are the same."*

Strength and progress, be it noted, is, clearly, the motive of differentiation and we have now Dharma, Duty, as distinguished from Yajna or voluntary Sacrifice, as the re-integrating principle; characterized as the Ruler of Humanity, moving forward to progress and civilization by

* *Brihadaranyaka Upanishad, Adhyaya 1, 4, 11-14.*

means of economic specialization of functions. The passage may well be taken as an *ex-post-facto* statement not only of the classification of society but also of the coordinating forces which came into existence during the long interval which elapsed between the Samhitas and the Upanishads.

And, while the earlier passages quoted from the Samhitas, speak only of the king and his people, the Purusha-Sukta a later Samhita passage, speaks of four classes, the Brahmin, the Kshatriya, the Vaishya and the Shudra: the first three representing respectively the specialization of the intellectual, the military and the plutocratic culture; and the fourth marking the incorporation in the body politic, of all the heterogenous elements of society, consisting of such of the aborigines who had accepted the Vedic civilization, and also the progeny of the intercourse between the Aryans and the Non-Aryans, which the establishment of peaceful relations naturally brought in its train. It is possible also to conjecture, that our ancient ancestors should have found it necessary to introduce the principle of Dharma or Duty as a principle of ordered progress, by way of a remedy against the chaos consequent upon the much more poetic but much less efficient principle of voluntary sacrifice, with which like every

branch of the Aryan race we first began our progressive career.

And, further, by fixing our attention upon the expression, "the King of Kings", we find the true relation between the King and the Law. It is under the protection of the Law that the king performs his duties. The king is likewise not above the law but is subject to it. He is not the maker of Law; nor the master of it, but he fulfils the Law, and is to be judged and controlled by it.

We have seen so far, that,

(1) The Vedas mention a king and his people; lay down for the king the duty of judging the strong and the weak with equal justice, and exhort him, to do good incessantly, and protect his country from every calamity. They mention taxes, and imply territorial Kingship.

(2) The Mahabharata records a tradition which favours the following as the accepted Indo-Aryan theory of Government.

(a) The people make laws for themselves.

(b) They want strong executive authority to enforce the laws made by them and to provide such an authority they elect a king.

(c) The people bind themselves to perform military duties, pay taxes, and generally to co-operate with the King, in the maintenance of Law and Order.

(d) The King agrees on his part to enforce the Law and bring offenders to justice, and generally to protect the people against wrong-doers, despite the risks and inconveniences involved in the undertaking.

(3) Later on, society is differentiated into representatives of intellectual, military and plutocratic culture; and a large proletariat is organized; all reintegrated under the supreme sovereignty of Dharma, the Law, 'the King of Kings,' than which nothing can be mightier.

CHAPTER II.

THE LAW AND ITS SOURCES.

I. WHAT IS LAW ?

Jurisprudence in the eye of Roman Law was the 'knowledge of things human and divine'. Pindar describes Law as 'the King of both mortals and immortals'. To Demosthenes 'the whole world and things divine and what we call the seasons appeared to be regulated by

Law and Order'. Chrysippus describes the Common Law as the 'Right Reason, moving through all things, identical with Zeus the supreme administrator of the Universe'. The view of Hooker must be particularly interesting to us. According to him, "Of Law it can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage; the very least are feeling her care and the greatest are not exempt from her power; both angels and men and creatures of what condition soever though each in different sort and manner yet all with uniform consent, admiring her as the mother of their peace and joy."

Numerous passages equally eloquent on the blessings of Dharma or Law can be cited from our literature, sacred and profane. But the passage in the Upanishad cited above, which identifies the Law or Dharma with Truth, will outweigh all appreciations, of Law, recorded here or elsewhere. Unyielding to any in its poetry, it inculcates the supreme majesty of the Law in an unmistakable manner untouched by any qualifications of any kind whatsoever. It is as we have seen the 'King of Kings', 'that by the aid of which even the weak may prevail over the strong'. It thus expounds

with scientific accuracy the true and main function of Law, and by implication, of the King also; the protection of the weak against the strong, of right against might. It also describes with scientific accuracy the true relation between the King and the Law. 'The King is not the maker of Law. He is subject to it, he is to be judged and appraised according to it. Law is not the creation of an arbitrary will of one or many. It is the same as Truth, identical with the supreme Intelligence, the "Right Reason, identical with Zeus, the supreme administrator of the Universe". 'Dharma is so called' says, the Mahabharata 'because it holds together'. 'In it every thing resides'. It is the moral law which makes for harmony, peace and progress in the midst of the strenuous life of struggle and rivalry in which every individual and every section of the community is engaged.

Like the English term Law, Dharma expresses itself in terms of command. Dharma is an *Artha* whose characteristic is Command says Jaimini. The term, *Artha* is explained as "Good" 'the means to good' It is thus essential that whatever is held founded in Dharma whether in the abstract or in the concrete, must be "Good," must be "a means to Good;" and it follows naturally that it is not Dharma if it is

not 'Good' if it is not a means to good, if it involves injury to some one or some thing. For it has been said that it is for ensuring harmlessness to beings that Dharma has been proclaimed. "That is Dharma," it is decided, "which is accompanied with the preservation of beings."

And, our conception of Dharma like the conception of the English term Law stands both for the abstract idea of order and for the abstract idea of rules of conduct. By identifying it with the Truth, it is made to stand for every thing that is good and noble. It stands not only for peace and order but also for progress. Dharma in the abstract knows no limitations of states and nationalities. Truth is its single support, Peace, Progress and Harmony its sole and single aim, and Life at large its great and boundless field. "It is in Truth that all this is founded; by Truth is all upheld." Dharma then knows no policy that is not consistent with Truth and the requirements of Truth, and its vindication. In the individual it expresses itself in terms of right ethical conduct; in the state and in the custodians of state interests it knows no other policy or principle of conduct but public, universal, good.

The central idea of this definition deserves to be thoroughly grasped. While de-

fining it as a word of command, it leaves ample room for the exercise of our inborn freedom when we are called upon to decide whether what is commanded is Artha or not; whether it is a means to good or whether it is not. And, in order to afford proper guidance to the human mind the law books have furnished tests and for facilities of decision provided lists, binding in varying degrees, and always useful to consult: and which, partly by their inherent reason and partly by the usage of ages have acquired a peculiar hold on the Indian mind.

3. "That is Dharma" says Manu "which is followed by men who are good and learned in the Vedas, and who are free from passions of any kind whatsoever; and which has been approved by our own heart." This approval of the heart leaves a large latitude again for free and independent action in cases of doubt and difficulty. 'The sole object of Dharma is' according to Vasishtha, 'the final good of Man; that by following it Man becomes the most worthy of praise in this world and after death gains paradise.' But more of this will follow presently.

4. II. THE SOURCES OF LAW.

The Vedas which by all authority is no other than the 'Voyce of God' is the

source of Law *par excellence*; and also Smṛiti the tradition and practice of those who are versed in it. This is Gautama's statement of the sources of Law. The statement of Vasistha is more precise and informing. "That is Dharma, which is enjoined by the revealed texts and by the tradition of sages; and on failure of these the practice of the Śishṭas has authority. Baudhayana also mentions the same sources.

The term Śishṭa is defined by Vasistha and Baudhayana. According to the former he is a Śishṭa 'who is free from the trammels of desire.' Baudhayana gives a fuller description. "Śishṭas, forsooth," he says "are those, who are free from envy, free from pride, content with a store of grain sufficient for ten days, free from covetousness, hypocrisy, arrogance, greed, perplexity and anger"; and he cites in support an ancient text which can be rendered, 'those are Śishṭas who having studied the Vedas together with their developments know how to draw inferences from them; the living authors of the Śrutis.

We can easily understand the point of these definitions. The definition of Vasishṭha, and the long list of attributes of Baudhayana both point to the same one truth that those whose word and practice are to be taken as authority ought to be men instructed in literature, sacred and profane, and morally

sound; men beyond the reach of want, and being endowed with learning and trained in the practice of Law, as good as living instruments of Revelation.

6. Apastamba's description of the sources of Law has a singular bearing. He 'proceeds to declare the acts productive of merit, which form part of the customs of daily life, as they have been settled by the agreement of sages': "the agreement of those who know the Law." Such an agreement according to him is an authority of equal grade with the Vedas; perhaps higher, for, he mentions it first. The Vedas are there as the ultimate source of all knowledge, but the customs which regulate our daily life sustain their authority by the agreement of those who know the Law; the convention of men learned in the Law, as we should now call it. Haradatta the commentator of Apastamba includes the Smritis under the category of "Convention of the Doctors." True, but we cannot omit to notice the real and unmistakable significance of the broad definition which makes the convention of the Doctors of Law an independent authority. In a later passage Apastamba gives a point to his definition in the following eloquent words. "Dharma and A—dharma do not go about and say, "Here we are"; nor do
- 7.

Gods, Gandharvas or Manes say to men, this is virtue; this is vice or sin. But that is virtue the practice of which the Aryas praise that which they blame is sin." He then propounds the following rule. "One should regulate his course of conduct according to the conduct which in all countries is unanimously approved by the Aryans, who are properly educated, who are advanced in age, who are of subdued sense; neither given to avarice nor to hypocrisy." This is practically Apastamba's treatment of the expression '*Sistachara*' of Vasistha and Baudhayana. But his expression *Dharmajna Samaya*, and his reference to the approval by the Arayns in all countries open the way for wide historical culture and deep research on the one hand and for the introduction of deliberative legislation on the other.

This convention of the learned which occupies such a high place in the text of Apatsamba appears as a supplementary source of law in other texts. 'On failure of these', says a text of Baudhayana 'an assembly of ten shall decide disputed points of law.' If they cannot all be masters of all the subjects utilizable in the ascertainment, elucidation and exposition of law, the ten men must be so selected as together to supply the entire stock of knowledge required for the disposal of the

point under consideration. This is one phase of representative element in the ancient constitution of the Aryan community. Four of these ten must be men who each know one at least of the Vedas; a Mimamsaka, a doctor who knows the various *Angas*, a scholar who can recite the Dharma Sastra or a Lawyer as we should now call him; and lastly three Brahmins belonging to the three different orders. The number ten is the minimum number, but not rigidly fixed. And when ten such men are not available five three or even one *blameless* man may perform the functions of the Parshad. But, says the text "A thousand fools will not, cannot, form an authoritative assembly:" So keen is the anxiety of the sage, for keeping the decision on points of Law, ceremonial public or private, in the hands of the instructed and enlightened members of the community, that he denies at this point any attempt to take shelter under a verdict of Brahmins who have no other claim, but that of birth, to the office of *jurisconsult*. Says Baudhayana, 'As an elephant made of wood, as an antelope made of leather, such is an unlearned Brahmin.' "That evil which dunces perplexed by ignorance and unacquainted with the sacred law decide upon, falls increased a hundredfold on those who propound it." And, the difficulty of deciding questions of law

is well appreciated by Baudhayana who discourages a Bench of one only, however learned he may be. 'Narrow and difficult to find is the path of Law, towards which many gates lead. Hence, if there is a doubt, it must not be decided by one man only however learned he may be.' And lastly, to put an end to all doubt about his meaning he declares, "Many thousands of Brahmins cannot form a legal assembly for declaring the meaning of Law, if they have not fulfilled the varied duties, are not acquainted with the Vedas, and subsist only by the name of their caste." The decisions of the Parishad constituted without any of the flaws herein mentioned would be, the reader will observe, the Dharmajna Samaya, the convention of the Doctors, of Apastamba.

II MANU AND YAJNAVALKYA.

So far we have the Veda, the Smriti, the Example of the selfless man, the Decrees of Doctors in meeting assembled, as the sources of Law. This is where the Sutras leave us. We now proceed to record the evidence of the metrical Smritis. Manu II 6 enumerates the sources of law in the terms of Gantama's text. He adds moreover, 'the custom of holy-men' and 'the satisfaction of ones own heart.' If the holy men are identical with the तद्धि of

the first half of the couplet, the mention of their custom as a source of law is redundant. It is therefore open to us to suggest that by the word सधु was meant 'holy men,' irrespective of caste, creed or culture. Holy men in those days could be found outside the world of the Doctors of Vedas, and beyond the limits of Brahmin orthodoxy. 'The satisfaction of ones own heart' is ordinarily interpreted as giving an option where option is allowed or implied by the text. And that is right. But if we read the text by the light of another we would feel disposed to see in it a deeper significance. Manu II,1. thus describes the Dharma which the compiler proceeds to expound. "Hear you, the Dharma, practised from day to day by those who are learned, good, and free from hatred and passion of any kind, and accepted by our heart." Commenting on the last clause of II,1., Medhatithi the learned commentator of Manu observes "The author means to say, I am not talking any Dharma but that Dharma which is followed by persons so estimable, or to which the heart is moved [of its own accord." It no doubt authorizes a free choice where option is allowed by the texts themselves, but even otherwise it would require approval of the heart as a condition for a command being placed in the category of

11. Dharma. It thus gives a rule of the approval of the moral or the æsthetic sense. The interpretation of the clause which would make it a subsidiary source of Dharma only where option is allowed, is hardly warranted by the frame of the proposition. It appeals to us rather, and therein we follow such an undoubted authority as Medhatithi to be a condition of recommendation. To the operation of the principle underlying that text may be referred such reforms as the substitution of पिष्टपशु for प्रत्यक्षपशु in the ceremonial Law; and the abolition of such practices as Niyoga and such institutions as slavery in the civil law of the Hindus. The suppression of the Sati in our own time may also be justified on the authority of this clause in the text of Manu. Manu reiterates the same in his summary of the subject of the sources of Dharma in II, 12; thus putting his final seal upon the essence of all good and meritorious acts. No merit can be acquired unless the act intended to bring it is done with the fullest approval of the heart and with the most loving enthusiasm. It is in fact an indispensable *condition* of a religious act, and wherever not in conflict with any of the other essential requirements of municipal law it takes the place of a rule of conscience which vindicates the inherent freedom of the Aryan mind,

The statement of Yajñavalkya is more comprehensive. Between the dates of Manu and Yajñavalkya most of what is known as the standard literature of our civilization had sprung up and Yajñavalkya would include all that in his list of the sources of law. The trend of Yajñavalkya's expressions would seem to justify the proposition that in his view anything that is a source of knowledge is a source of Dharma. He thus mentions the Vedas with their limbs and their growth, the Puranas, the systems of philosophy and the Dharma Sastra. As an indication of the conditions of the time when the Smṛiti might have been propounded that statement would also imply that all these seats or sources of learning, formerly not differentiated, might have been at that time specialized, so far so, that unless learned representatives of all these branches of learning were brought together it might have been the belief that no satisfactory solution of a question of doubt or difficulty could be arrived at. These fourteen seats or treasuries of learning are thus to be studied and investigated for a proper knowledge of the principles and materials of Dharma; thus clearly implying that of the written literature while the Vedas and the Smṛitis were enough to satisfy the authors of the Sūtras and even Bṛhgu, to Yajñavalkya it appeared expedient to extend

the application of the term Veda to all the standard sacred literature of the country existing at the date. He also mentions the '*Sadachara*' and 'satisfaction of the heart,' as sources of law, following Manu in including the last. But he also adds a new member—"Desire born of righteous resolve."

What is the significance of this further addition? Manu-II 3, 4, 5 discuss the place of desire in right conduct. But Yajnavalkya gives it a broader aspect and includes it among the fundamental sources of law. Of course it must be "desire born of righteous resolve." Such a law, would be a law set to one's own self by way of self-discipline, for instance, with some ultimate object in itself not improper. It would also sanction practices involving a certain amount of self-indulgence, outside the strict limits of Sastraic injunctions; provided the object is good, and the resolve righteous, that is, not inconsistent with the spirit of the law as propounded by the authorities. It would also meet the requirements of new and unforeseen situations. Matters of law, including the propriety or otherwise of an act, could be decided not merely on authority but on first principles also, where authority is silent, doubtful or obsolete, and, inapplicable to the environment of the day.

We have seen the gradual evolution of the doctrine;—from the Vedas and the Memory of the learned, (the Smritis) to their conduct and their opinion settled by agreement, each supplementing the Veda to satisfy the requirements of a growing civilization. Manu finds a place for conscience and adds also the example or custom of the good men of the country whether within or without the pale of Vedic orthodoxy. Yajnavalkya recommending consultation with all the standard serious literature of the country for a proper determination of questions of law, goes a step further and by including, 'desire born of righteous resolve' liberalizes and humanizes the whole conception of Dharma. It is a complete story of the march of the Law governing human conduct from the irrevocable authority of the Revelation to the same as illustrated and supplemented by the example of the good and great; illustrated and supplemented, further, by the agreement of doctors of law, the approval of the conscience and finally, by disciplined self-rule.

It need hardly be added that in applying these dicta to the subject of राजधर्म or constitutional law, we are expected to consult the example of good kings and good ministers whether within or without the pale of Brahmin orthodoxy, the ultimate criterion being

supplied by the 'Good of the People' as we shall see later, just as the ultimate good of one's self is the criterion in case of the conduct of the individual. Universal history and biography and the standard literature of every respectable nation would be expected to be consulted in situations new and unforeseen. And, generally, our conception of Dharma far from being confined within the four corners of a certain book or series of books, is broad enough to include all science, and all literature and every thing that is good, great and abiding, in the conduct, customs and conventions of men and women in various stations of life. Dharma is a complex entity, too subtle to be closely defined and yet patent enough to be seen everywhere. Thoughtful minds, well informed, dispassionate and disinterested, can always detect what is Dharma and what is not, in a given situation, and can always be relied upon particularly when in Parshad assembled, discussing and pronouncing upon legal problems of state, with due solemnity.

These are the sources of Dharma. It expresses itself in terms of command. Dharma thus ascertained man has to practise, and the king is instituted to judge between the strong and the weak when Dharma has been violated and, as we shall see later, when the violation has been complained of. To Dharma thus as-

certained the king is as much subject as the meanest individual on earth; and by Dharma thus ascertained is the king to be guided and controlled; to be judged and appraised.

III DHARMA AND SECULAR LAW.

Dharma, it may be noted, here, is not identical with secular law but in Indo-Aryan phraseology it includes the latter and the sources of such law are the same as the sources of the larger entity Dharma. Dharma, in the concrete, is a body of rules of conduct, with spiritual degradation as the sanction. But there are certain rules to which the society demands unflinching compliance, with a penalty, in case of infringement, to be inflicted here, on the physical and material plane. Of the infringement of such rules the king is a judge and also, as we shall see later, various other bodies to whom the safe keeping of the rules is either naturally or deliberately entrusted. Such rules form the body which goes by the name of Law, deriving their authority from any of the sources mentioned, custom and convention included, carrying with them their appropriate sanctions to be enforced by tribunals mainly internal in relation to the individual hauled up for contempt. The king steps in when the entire community is affected as in the case of criminal conduct or

when vital interests of individuals are violated as in the case of civil law, and, in some cases, only when the internal tribunals fail to enforce compliance.

In the canons of Dharma Sastras or rather the Dharma Sastra, for, the unity of the various Law-codes is an inviolable assumption of Hindu Law—we find an ample theory and a detailed statement of the duties of the king and the organization of government. These it is our present purpose to study. The intricacies of the Dharma Sastra are assumed to have been inspired by Manu, either an actual king of the Aryans, at a remote period; or an Idea or Ideal of kingship. As a matter of science, however, it may be taken, that it is a record, of ideas and ideals, observed facts and *ex-post-facto* statements, expounding a large body of social Law as it coursed along in its evolution, through centuries, during which the Aryan Society of the East, settled down in peaceful life in the happy lands of Arya-varta. It concentrates the thought and experience of ages and is endowed with the halo of high authority due to its solid, and sometimes, naked truth. When it embodies a statement that 'God created so and so' it records the sincere belief of the observer, seeing as, distinguished historians see now, the hand of Providence, in

all great movements and remarkable developments in the life story of states, countries and communities. When it enjoins that the King or the Brahmin shall do so and so, or be so and so, it reflects the opinion or expectation of some recognized leader of thought, or the common sense of the community concerned. And, when the various codes prescribe rules of conduct, minute in detail, and dictatorial in tone, they do so in conformity with the true state of opinion of what is good for the individual or class addressed and for no ulterior purpose. Far be it from me to say that the Dharma Sastra represents an absolutely unassailable theory, and a perfect code of rules of life: but I desire to record and impress upon the reader, an humble protest against the interpretation of the Dharma Sastra which explains its canons as a set of selfish injunctions ordained by the wily Brahmin in his own interests, and utterly oppressive and crushing to the rest of the community.

With this preface, I proceed to draw a statement of the constitutional theory as reflected in the directions on the subject embodied in the Law books of the Aryan community of India, more than two thousand years old.

CHAPTER III.

KINGSHIP.

I. THE KING: HIS MISSION AND QUALIFICATIONS.

The king is supposed normally to belong to the second of the four divisions of Aryan Society, consecrated by the Purushasukta, but the rules laid down for the qualifications of the king and for the guidance of his conduct, would apply to everyone appointed f. 1. to the position. And we shall observe as we go on that from the first we have looked upon the king not as the repository of prerogative but as the servant of society with duties, onerous exacting, and unpleasant.

Thus, Vasishtha XIX, 1, 2, 5, characterises the life of the king as one long sacrificial session involving abandonment of fear and pity. His special function is to keep to their respective duties the four Varnas, having due regard to the true spirit of local tribal and family laws. The mission of the king is the protection of created beings and if he keeps to it he obtains the purpose of his life. Baudhayana, IX, 2, 3, explains the same thing by means of another formula. 'The Brahma,' he says, which by the bye is our name for the Eternal Source of Existence and Progress, placed its *Majesty* in the Brahmins, coupled with the duties and privileges

of studying and teaching, sacrificing for themselves and for others; and liberality and accepting gifts: in order that the learning of the Vedas may be preserved and protected. In the Kshatriya the Brahma placed *Strength* together with the duties of studying sacrificing and liberality, the use of weapons, for the protection of the life and treasure of created beings, and for the growth of good government.

Both these canons clearly point to the directions in which to look out for the duties of the king, although they are couched in poetical and theological language. But Gautama XI 1...6 has a set of direct and secular looking rules. He lays down:—

“The King is the Lord of all except the Brahmins. (We shall notice this exception presently.) He shall do the *good*, He shall say the *good*. He shall be fully instructed in the Vedas, and in the Science of dialectic. He shall be pure and self-controlled. He shall have men of merit to help him and shall always remain provided with the resources of good government. He shall treat his subjects with justice and equality and always do what is conducive to their interests.”

The statement of Gautama looks ~~like~~ like an epitome of a chapter on the subject of

some modern treatise on politics. The king is to have a large share of education. The achievement of good is the goal of his executive and judicial functions. He is enjoined to select his ministers, from men of merit, and to take care that he is fully equipped with the resources of good and efficient government. What is particularly remarkable is that he is to maintain equality and impartiality in his relations with his subjects and is directed to look upon conduciveness to their interests as his sole concern.

The texts of Manu and Yajnavalkya on the subject are more or less amplifications of these and similar *sutras*. But in both these codes, there is mentioned a subject for the king's instruction, which deserves to be specifically noticed. Man VII-43, after directing, that the king shall learn, from those learned in the Vedas, the threefold (sacred) Science, the primeval science of Government, the science of dialectic and the knowledge of the Supreme Soul, adds, "he shall learn, from the people the theory of the various trades and professions."

Yajnavalkya I,13,311 also mentions the same, and goes so far as to assign to the last of Manu's list a place before the Vedas. The word used in the original for trades and pro-

fessions, is *Varta*, and Vijñaneshavar explains it to mean, "The science of the Production and Preservation of wealth."

We therefore have it, that the king is enjoined to be instructed in the learning of the Brahmins, is to be instructed as a matter of course in the science and art belonging to his profession, and also in the sciences of Economics, Industries and Commerce. This last points to a state of growth involving difficulties and complexities in the body social of which the king was the protector.

The primary duty of the king is as we have seen to keep the various classes of his people to their proper duties; and since the king is enjoined to do the good and say the good, and work always in the interests of the community, his duties are necessarily subject to that great consideration, and he will always have a large latitude in the performance of his duties in the direction. The Dharma Sashtra therefore has in this matter a decidedly political aspect, and although formally this involves interference in the smallest details of the movements of an individual, it is interesting to see that the interference is minimized and circumscribed by adopting the device of creating a strong *Opinion* in favour of good *Social* conduct, and a system of *private*

government altogether unique in the history of the world.

II. THE RULE OF OPINION.

We have seen that the duty of teaching devolved upon the Brahmin. An elaborate body of Rules of conduct or Achara was formulated at the principal schools of learning and included in their curricula; and every Aryan was required to attend the school for a certain period, from a certain age upwards to years of maturity. These rules of Achara are classed as mandatory and commendatory; and formed the basis of public opinion and judgement upon the conduct of individuals. The rules could change classes in obedience to reasoned opinion for the time being.

Another source of *Opinion* is the Prayaschitta section of the Dharma Sastra. Achara is positive domestic law, so to say, and the Prayaschitta or penance formed its sanction. Deviations from the 'Rules of conduct' were called sins; and they were graded into five classes, the most serious involving a 'fall', the others contamination in varying degrees. The expiations were to follow the tide of reasoned public opinion and were to be performed without the knowledge or

intervention of the king. Some sins also changed classes.

In general life, the intervention of the king was minimised with the aid of these devices and the operation of the king's rule was confined to those matters which were included under the term Vyavahara or Rules of Justice; including the Criminal Law, and the laws of property and its devolution the laws of contract, and the like, which, then, as now, formed the subject matter of judicial trials.

It may be stated roughly and in a general way that all anti-social conduct which involved injury to person or property was necessarily amenable to the jurisdiction of the king: all private mis-conduct involving only loss of personal merit, or claim to personal honour and social position, were matters of *opinion* over which some of the various private organizations had jurisdiction, with excommunication, Prayaschitta and the like for sanction. In some cases the jurisdiction overlapped; and under certain circumstances might change places.

Living under these two jurisdictions, the Aryan in India had practically the whole of his life under an effective discipline which though injurious when exaggerated has on the whole had an influence for good and was

not, at least for those early times, irrational.

The Brahmin being the teacher, and educator was thus the chief custodian of opinion also, and since Opinion and Law have been the two chief instruments of government in every country, and at all times, the Brahmin is characterized as dividing with the king the responsibility of Government, and to that view of the function of the Brahmin is to be traced the special privileges that he has been endowed with.

III. THE BRAHMIN.

We have seen that the Brahmin had thrown upon him the responsibility of creating and propagating Opinion, which of course included forming true Opinion also. He was therefore to study the entire body of literature or as in later times, specialized branches thereof and was to instruct disciples. He was the great, and only educating agency of the country. Teaching meant studying and teaching efficiently meant ceaseless and singleminded devotion to learning. The Brahmin had also thrown upon him the duty of mastering the sciences appertenant to the various means of subsistence, of which Mann specifically mentions the following: 'learning, mechanical arts, work for wages, rearing cattle, traffic, agriculture.' The Brahmin has to know

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the true principles of all of them and is enjoined not to practice any of them for profit, except under necessity, when some of the professions were thrown open to him. But even then he was to have no more than necessary and was to revert to his true profession as soon as the necessity was at an end.

In the interests of Science and Society then the Brahmin was to remain the Bondsman of letters and in compensation for the disabilities which were thus imposed he was made the special object of public favour, and a system of valuable privileges was organized to keep him loyal to his post. He was told that his very birth from Brahmin parents carried with it the obligation of learning, as much of the literature of his country as his capacity premitted, by heart, and he was also told that the best thing for him to do was so to conduct himself that he may be able to live happily upon the scanty income consisting of the gifts of the religious and the charitable among the people about him. Contentment was for him a great virtue, and he was to be a model of devotion to learning and piety. Having told this, he was told what privileges social and political were reserved for him if he kept to his post and his duty; and it was made clear to him that the privileges would be withdrawn if he did not satisfy the requirements of his position.

9.

'A King and a Brahmin, extensively read' says Gautama in VI 3. have taken upon themselves the ordinance of maintaining the moral order. For on them depends the life of the fourfold humanity, of intellectually conscious beings, and those who walk, and those which fly and those which creep. The term (extensively read), *Bahusruta* had acquired a technical significance. Gautama VIII-4 *et seq* thus expounds its meaning.

"He is *Bahusruta*, who is versed in the affairs of the world, and knows also the Vedas and the Vedangas, who is proficient in disputation and is well informed in tradition and history; who is, moreover, always in search of these, and has that as his means of livelihood; and further, who is sanctified by the forty sacraments, and who is devoted to the three and six activities of his life and who is well versed in that body of literature called the *Samayachara* (convention of the learned having the force of Law.)

Such a Brahmin shares with the King the responsibility of upholding the moral order of the Kingdom as Haradatta, Gautamas' commentator, puts it; and such a Brahmin is an exception according to Gautama to the King's rule: a Brahmin who having received the highest culture available for the times, comes in competition with no wage-

- earner for the means of his livelihood, and who, moreover, is by the hypothesis so closely occupied with his studies and his problems that he has hardly the time to think of wrongdoing. The King can do no wrong says the English maxim: certainly; but also the Brahmin who is BahuSutra, probably in a much sounder sense. But again, to clear the Law of any partiality for the Brahmin, however cultured, Vijnaneshvar in his Mitakshara explains the text in question (ब्राह्मणवर्जम्) as being only words of admiration and definitely lays down that the Brahmins are not to be considered as beyond the pale of the King's jurisdiction.

VIII THE PUROHITA.

- Vasistha, as we have seen above, has characterised the life of the King as one long sacrificial session meaning thereunder to invest the office of the king with religious and spiritual dignity, and at the same time to absolve the king from the performance of the daily sacrifices which at one time formed the distinguishing feature of Arayan life, and to authorize him to appoint a deputy for the purpose. For, as the text proceeds, 'A realm where a Brahmin is appointed domestic priest prospers, since it would give more time to the king to attend to his secular duties. Baudhayana marks out an extended

function for the Purohita making him foremost in all transactions. In Gautama we find the same idea in an amplified form.

“He (the king) shall protect the Var-
nas and orders in accordance with justice
and shall lead back to their duties those who
have strayed away from them. For it is said,
‘He shall enjoy his sixth share as long as he
himself keeps to his duty’. He shall place a
Brahmin at the front, a Brahmin who is
learned, of noble descent, eloquent, handsome
and of suitable age, and good character;
who is of a disposition that respects justice,
and who is austere; (accustomed to self-con-
trol and self-denial) with his assistance shall
the king perform his duties, since it is
well known that Kshatra, government, urged
forward by the Brahmin, advances, and is
saved from trouble”.

The question of the place of the Pu-
rohita in the ministry will be dealt with
in the next chapter. A Brahmin so far
is no doubt in high power at the court,
but an austere sturdy man of high culture
piety and character, neither too young nor
too old, learned, just, eloquent, handsome,
well born: such a Brahmin would be a desir-
able adviser for any monarch, whatever the
latter's creed or nationality. We have now

got enough to convince us that wherever the canons of the Dharmasastra mention a Brahmin for a place of power and distinction care is always taken to add and emphasise the moral and intellectual attainments that do really entitle him to occupy the place and enjoy the distinction. And they mention the Brahmins because the writers were persuaded that government assisted and urged forward by the power of dispassionate character austerity, and learning, advances and is saved from trouble; or to put it in another form, divorced from dispassionate character austerity, and learning Government fails in its mission and is landed into trouble. It may be also added that the maxim cited by Gautama is entirely in the abstract and claims universal application. It is, when assisted, by Brahman ब्रह्म learning (not the Brahmin.) that Kshatra क्षत्र Government, (not Kshatriya) makes for progress. Moreover, the Brahmin was the custodian of a complex civilization and charged as he was with the responsibility of maintaining it in full vigour and carrying it on to perfection, there is nothing strange in Gautama insisting upon a substantial association of the highest representatives of Brahmin culture in the administration of the country.

CHAPTER IV.

THE ADMINISTRATIVE ORGANIZATION.

1. THE MINISTRY.

The Brahmin was the custodian of a complex civilization. The entire character of that civilization is wholly and truly summed up in one word 'Dharma'. The primary function of the king was to keep his people at their Dharma, to protect the life and property of people, and to employ superior learning and high moral attainments for the benefit of his subjects. He is asked as a general rule to put an austere sturdy Brahmin of learning and character at the head of affairs, spiritual as well as temporal.

- ef; 1. Vishnu further recommends that the Purohita shall be well versed not only in Vedas but in History Dharmasastra and Economics; and recommends similar high moral and intellectual qualifications for his ministers. And Manu, reiterating these qualifications adds knowledge of the Sastra, courage, and use and practice of arms, to the list and insists upon having them well tried before giving them positions of confidence. Here is a sound and sagacious rule. Heredity learning character and all other qualifications however ample, will raise presumptions, and strong presumptions no doubt, in
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favour of a candidate; but for a seat in the ministry it is hazardous merely to depend upon presumptions however strong and well founded, and a fair trial in places of minor importance is rightly insisted upon as a matter of necessary precaution.

3. Manu's ministry consists of seven or eight according to the requirements; but it would appear that the number would be one or the other according as the Purohita is included in the ministry or is kept out of it. At some period the tendency appears to be to confine the Purohita to spiritual duties only.
4. Yajnavalkya mentions the Purohita separately but advises the king to first discuss matters of state with the ministers and then with the Purohita, constituting the Purohita a sort of confidential adviser to the King, a keeper as it were of the king's conscience. This adds a peculiar dignity to the office of the Purohita, and throws upon him an open and onerous responsibility. Vishnu and Yajnavalkya therefore rightly insist upon having a Purohita as well qualified as the best of the secular ministers. It is a warning to the king not to entrust his political conscience to an ignoramus in Politics.

5. Manu's commentators explain the various attributes in a manner which throws some light upon the kind of conduct expected from

the ministers, and the reasons why these qualification were demanded.

The expression मौलान् is rendered 'those whose ancestors have been royal servants'; and is explained by Medhatithi as implying hereditary acquirements, an ample following of relations and dependents, and an open fortune; men who have substantial stakes in the country in men and money, in family name and personal honour. शास्त्रविदः rendered, 'versed in Science' is explained as knowing the science of politics of course, but particularly the law of master and servant as applicable to the relation between Crown and Ministers and implying such virtues as, wisdom, firmness capacity for holding secrets, tactfulness, eloquence, strength, quickness of perception, energy and personal magnetism; endurance, purity, liberality, popularity and abstention from making enemies. The explanation is too comprehensive and perhaps made to imply too much; but it gives us Medhatithi's idea as to the qualifications of the Minister.

शूर of course means, brave and heroic, capable of sacrificing life health home or property if called upon to do so in the interests of the king (it ought to be the state). लब्धलक्षान् rendered 'skilled in the use of weapons,' is explained to imply, along with this, experienced in men and affairs, at the lower rungs

of the ladder of public service. कुलोद्भूतान् rendered 'well born', implying according to Medatithi an assurance against malfeasance of any kind whatever under the restraint of the fair name of the family. सुपरीक्षितान् is rendered 'well tried'; and Medhatithi explains the expression as involving the idea of tests not in one but in of all the temptations, that upset the balance and draw men into improprieties and sinfulness. Medhatithi's explanations demand a highly artificial and in certain respects perhaps an impracticable method of selection, but they show the high conception of the responsibility of selecting ministers, who are always real the virtual rulers of men, whether the form of government be monarchical, aristocratic or democratic.

6. These are Manu's ministers. Manu has a list of questions which the king is asked to consider with these ministers, or what we should now call ministerial questions. They are, questions of peace and war; of army, treasury, and internal administration of the towns, and the kingdom in general; questions again of agriculture industry and commerce, of the means, that is of the production of wealth; the defences of the country; and questions of restoring peace and order in tracts newly conquered. And he lays down the procedure also. "First ascertain the opinion of each sepa-

rately and then in council:" and 'do what is best for you.' The last clause makes the ministers a consultative body merely, the final responsibility resting on the king.

7. But that is not all. Manu wants the king to hold confidential consultations with a distinguished, honourable and learned (non-official) Brahmin in all matters of supreme importance; to repose full confidence in such a councillor, and settle the precise range and character of measures in consultation with him and then proceed to promulgate them.

And further, by way of distribution of office Manu promulgates the rule *ziz* that the army shall be directed by the commander-in-chief; the treasury and general Administration including justice shall be attended to by the king himself, and questions of peace and war shall be in hands of the Foreign Minister.

This finishes the ministry. Manu wants the king to appoint other ministers, pure, wise, of settled habits, and well tried, and well able to collect money. These are his Collectors of Revenue. But it may be mentioned that these are of equal importance with the members of the ministry. Medhatithi explains this canon as an exception to the limit of number (seven or eight) laid down above and Kullūka and Nān-

dana, distinguish these from the first by calling the first deliberative, and the latter executive ministers. These then are not mere collectors but ministers of rank charged with executive duties pertaining to Revenue and Finance. And for all branches of State business Manu (VII 81) recommends the appointment of Heads to supervise in detail the acts of King's officers.

When exhausted the King is permitted to appoint his Chief Minister to preside over his Council as his own substitute. (Manu. vii. 141).

II. PEACE AND ORDER.

8. Police stations are required for every two, three, five, and hundred villages : and these must be suitably officered. Moreover, every village must have a subordinate *Magistrate* ; superior Magistrates must be placed in charge of groups of ten, twenty, a hundred and a thousand villages. The Magistrate of the thousand villages had plenary powers and was subordinate only to the central authority at the head-quarters.

The following administrative procedure is laid down by Vishnu Smṛiti.

If there is disorder in the village, let the lord of that village (the magistrate) suppress the evil and give redress to those who have been wronged. If he is unable to do so let him report it to the lord of ten villages ; if the latter,

too is unable let him report it to the lord of the hundred villages; if he too is unable let him announce it to the lord of the whole district. The lord of the whole district must eradicate the evil to the best of his power. Manu gives the local heads authority only to report but does not expressly give them power to deal with the evil. Medhatithi, Manu's commentator however, reads this in the text and explains it accordingly.

Manu's text contains a word शनकैः which is variously interpreted. One commentator explains it as meaning 'with preserver'. Another commentator explains it by 'with undue haste'; 'after having seen the truth of it.' The latter is obviously the more appropriate interpretation and enjoins the ruler to caution and adoption of a judicious procedure to sift the truth.

9. At the head-quarters Manu (VIII 1) maintains a special minister and a separate department for district work and requires particularly that this minister should be of a loving meaning, 'loving' or as we should now say 'sympathetic.'

10. For each town Manu requires a 'Governor or Superintendent over all affairs, elevated in rank, with large powers resembling a planet among stars.

This completes the organization of the administration of the interior: a hierarchy of

lords of one, ten, twenty, hundred and a thousand villages; a governor of rank and dignity for every town, and a special separate minister, able and sympathetic at the head-quarters. It appears also that the governor of the town has the duty of general control over the district of which the town may be the capital. This makes it rather doubtful whether the city is organized as a separate unit of administration or the governor is the governor of the province, of which the city is the head-quarter. At any rate he takes rank below the minister at the head-quarters, and is probably identical with the lord of a thousand villages, or enjoys a superintending jurisdiction as a link between the minister at the head-quarters and the district administration.

11. Vishnu further contemplates the appointment of an able officer for the working of the country's mines, for the levying of taxes, an officer to collect the toles at the ferries and an officer in charge of elephants and forests. And, he adds a general canon, which lays down that the king shall appoint pious persons for performing acts of piety, men of skill for financial business, brave men for fighting, stern men for acts of vigour, and eunuchs as guardians of ladies.

A word about the relations between the king and his services. Adequate salaries for their support, and strict injunctions against accepting illegal gratification, this is the main feature. Confiscation of all property and deportation out of the king's territories, this is the penalty for dishonest servants of the king. Yajnavalkya mentions honour to the good, and degradation to the opposite. There is no evidence of any honorific titles but grants of substantial revenues and promotions in rank and dignity are not unknown. Yajnavalkya particularly mentions the Kayashas, writers and accountants, from whom the king is asked to protect his subjects, 'for they are favourites of the king clever and indispensable'.

We have no room to summarize the canons relating to the diplomatic, foreign and military organization. It may be stated however in general that Manu's arrangements contemplate a high state of civilization and complexity of political and diplomatic relations, and aim at efficiency by a centralized system of administration and scrupulous care in the selection of the personnel.

CHAPTER V.

THE PUBLIC EXCHEQUER.

I. THE KING'S PURSE.

- Ref: 1. "Let the king protect his subjects receiving as his pay one sixth part" (of the income or spiritual merit, as the case may be) so says Baudhayana. Vasistha and
2. Vishnu endorse. But Gautama has a complex rule. His canon is, "The cultivator shall pay to the king a tax amounting to one tenth, eighth or one sixth" and Manu expressly accepts, the rule of Gautama, substituting a 'twelfth,' for Gautama's tenth (of the crops). The commentators explain that the limits are to be governed by the superiority or inferiority of the soil, and the amount of cost and trouble required in raising the crops.
3. But the sixth, eighth, or twelfth of what? of the gross produce or of the profits? The question is answered invariably in favour of the cultivator. "The Kings' income is to be drawn from the surplus," is Gautama's canon on the point. Of the commentator's we quote here Nandan's statement as being the most explicit. "Every where, the division is to be of what remains after the cost is deducted."
- This is the cultivator's contribution to the king's purse. From those who live upon cattle, the rule is that their contribution shall

amount to one fiftieth of their increase over the stock or a 2% on the income.

Next comes the Banker, whose stock in trade is his 'gold'. He also contributes the fiftieth of the increase over his stock or as we should now say 2% on the income.

Now come articles of merchandise. Here there are notable differences. Gautama has first a general rule, of one twentieth, and as exceptions, mentions, roots, fruits, flowers, medicinal herbs, honey, meat, grass and firewood, on which he would charge only a sixtieth: that is 5% generally and about 1. 6% on the articles covered by the exception. Vishnu adding a few more articles however allows $\frac{1}{6}$ th and Manu endorses it. *

The discrepancies would have been difficult to account for but for the following rule of Manu in VII 127 which runs as follows—

“Having well considered the rates of purchase and sale, the length of the road and the expenses of food and condiments, and the charges for securing the goods, let the king make the traders pay duty”.

Manu's rule thus clearly contemplates $\frac{1}{6}$ th of the profits, and in order that there may be no difficulty or ambiguity about it, enumerates what items should be included in the cost-

* S. E. 16 Manu 237.

price of the articles; which by the bye makes up a fairly exhaustive list. The 5% and $\frac{1}{6}$ th % of Gautama would mean possibly *ad valorem*. The above rule of Manu can also be interpreted as giving a discretion and laying down the manner in which to exercise it. To this aspect of it we revert later.

5. Vishnu includes cloth in the 2% rule. It would seem that about his time or in places where Vishnu's institutes governed, the manufacture of cloth might have exceeded the requirements of home consumption.

6. Vasistha exempts the profits from rivers dry grass, forests, places of combustion and mountains from any taxes but adds that something may be levied from those who derive their sustenance from them. The practice probably was not uniform.

7. Vishnu has a rule with respect to articles of merchandise which are liable to be exported to foreign countries. Vishnu II 29 and 30 run as follows —

Let him take a tenth part of (the price of) marketable commodities (sold) in his own country. Let him take a-twentieth part of (the price of) goods (sold) in another country.

This can be interpreted as authorizing a general Excise and Import duty of 10% *ad-valorem* and an Export duty of 5 %. This

indicates a complex economic condition; and it is not difficult to say whether the tax is merely for the purposes of revenue or protective. A 10% excise is too heavy unless meant to counteract a 10% Import which can only be for purposes of revenue for were it protective it would defeat its own purpose with the Excise by its side. It must therefore only be for revenue purposes, and argues a highly complex and expensive condition of the requirements of the Exchequer. A 5% Export also would point in the same direction. We have seen that the inclusion of cloth in Vishnu's list marks an advance in the manufacturing industry. We have no means of judging whether the 5% Export was on raw material or finished product. Probabilities are it must be on both.

8. On articles imported from over sea the king had the right to claim by way of royalty one 'choice' article, and a tax of 10% ad-valorem. This would refer to articles of a superior class. For inferior commodities the rules give a discretion and requests the king to refrain from oppression.

9. Vasistha generally accepts the rule of $\frac{1}{8}$ th and gives a wide discretion as noted above for articles of merchandise. Apastamba is satisfied with a general authorizing clause. 'The king shall levy taxes in accordance with

to the king except when found by a Brahmin true to his profession, in which case the latter takes the whole. Vishnu (III 56 *etseq*) accepts Gautama's rule but has another set of rules when found under different circumstances. If found casually by the king's men one half must go to the Brahmins and the other half to the Exchequer. If the treasure trove is found by a Kshatriya, he must give one fourth to the king and one fourth to the Brahmins, keeping the remaining moiety to himself. With a Vaishya the Brahmin shares a clear half and the remaining half is divided equally between the Brahmin and the king. A Sudra divides the treasure found by him into twelve parts, of which five go to the king, five to the Brahmins and two go to himself.

But when the treasure is anciently hidden by the finders themselves only one twelfth goes to the king, the remaining going to the finder whatever his *varna*. The king does not claim the twelfth from the Brahmin however.

13. Of the judicial and disciplinary fines nothing need be said. Any seller or buyer who fraudulently avoids the toll bar loses all his goods. He does to this day, so also those who conceal the treasure trove. The king is the ultimate heir in every system of fiscal jurisprudence.

14. Besides this the king is entitled to claim a day's labour per month from every artisan. Remitted into an annual tax in money it would amount to wages of 12 day's labour in the year; meaning 3'3 . But as Gautama directs, he has to be given his food for the day: and this when taken into account would reduce the percentage appreciably, if it did not abolish it altogether, in those early days, when wages were extremely low. And generally Mann's rule is that any man, residing in king's territories and living upon some trade or profession shall be required to pay something by way of taxes to the king.
- 15.

II. GENERAL CANONS OF TAXATION.

16. It will be now for us to consider Mann's general canons of taxation. These are:—

(a) Let the king cause the annual revenue in his kingdom to be collected by trustworthy officials; let him obey the sacred law in his transactions with the people and behave like a father to all men.

(b) Having well considered the rates of purchase and sale, the length of the road and the expenses for food and condiments, and the charges for securing the goods, let him make the traders pay duty.

(c) After due consideration the king shall always fix in his realm the duties and

taxes in such a manner that he himself and the man who does the work both receive their due reward.

(d) As the leech, the calf, and the bee, take their food little by little even so must the king draw from the realm moderate taxes.

Manu's rules mark an advance in the complexity of our civilization. Questions not covered by custom or for which old customs might have been no longer suitable must be arising, to give to the author, the occasion to formulate or record these several rules or in modern language, canons of taxation. These canons of course relate only to the relation between the producer of wealth and the king, its protector, and the only question to decide is what will be the protector's fees, or wages in the language of Baudhayana, in exchange for his services in keeping away thieves and robbers.

The following canons can be deduced from Manu's rules.

1. The taxes shall be annual.
2. They shall not be arbitrary but follow established usage, or accepted authorities.
3. Where the king has to exercise his choice he shall look upon himself in a quasi-parental capacity in relation to his subjects.

4. In determining taxes on Mechandise, he shall take into consideration,

- (1.) The cost of the articles;
- (2.) The prices realizable;
- (3.) The cost of labour and transport,
- (4.) The expenses of the family of the trader, including the kitchen expenses,
- (5.) And, the taxable capacity of the article.

5. The taxes shall always leave due reward to the worker.

6. They shall be so drawn as to cause no detriment to the corpus.

7. They shall be levied most on unnecessary and injurious articles. (Spirituuous liquors and the like.)

8. They shall be just enough for the requirements and purposes of the state.

9. They shall not be prematurely levied.

10. Honest men attached to the king shall be employed on the duty of collecting the taxes.

Canons 7, 8 and 9 require some explanation. They are drawn from the metaphors of the leech, the calf and the bee,

The leech does not draw healthy blood, but feeds upon the unnecessary diseased and injurious blood collected in the human body. The state likewise should levy taxes on articles which are not necessities of life but most on articles the use of which is injurious to the community, so that the taxes may have a restrictive and beneficial influence. Taxes on luxuries, and such commodities as intoxicating drugs, and spirituous liquors will fall under this canon. The metaphor of the calf furnishes the next canon. There is plenty of milk in the udders of the cow, but the calf is not allowed more than enough for its nourishment, the rest being collected to pay the cost of maintaining the cow and the reward of the cowherd. The metaphor of the bee supplies the canon against taxing or raw articles. The bee would not go to suck the honey from flowers not yet blown, and will suck them again in such a manner as not to retard its further growth. Taxes on raw produce or taxes on infant industries, such as would inevitably result in retarding their growth, would be offending against this canon.

Lastly, Gautama specially directs that the king shall live upon the surplus that is to say, according to Dr. Bühler after collecting his dues he is to discharge all the

obligations and turn to his personal use only such of it as remains after all the obligations are discharged. There is no doubt that the words bear this interpretation. They are also capable of the other meaning referred to above, (p. 51) a meaning, which puts an end to all controversy as to whether the taxes are to be on the gross produce or on the increase or profits. The king is to draw his maintenance from the increase the profits, and not on the gross produce or income of his subjects.

We have seen the sources of the king's income; we have also seen what precautions he is required to take in levying and collecting taxes. We have seen also that from the fund thus collected he is to discharge his obligations first and to turn the surplus alone to his personal account.

III. THE NONTAXABLES.

In all systems of fiscal jurisprudence there are certain persons from whom no taxes are leviable. The Dharma Sastra has a fairly long list of these persons. We shall take the list for consideration.

16. The first and foremost is the Srotriya, of whom more presently. Then you have the king's servant; the principle of his exemption being a tacit understanding taken into account in fixing his salary. Then follow, orphans,

ascetics, infants, minors and old men; the student, men who are very charitable and also widows who keep the marriage vow, maidens, and wives of servants. Apastamba would exempt all women, whatever their caste. Apastamba qualifies 'ascetics' with the expression, 'who are intent on fulfilling the sacred Law.' Haradatta explains the qualification as implying the exclusion of those who perform austerities in order to make their magic charms efficacious; not an unreasonable explanation; but Dr. Bühler suggests that Apastamba means to exclude all heretical hermits of whom India had plenty at all times. Both the explanations may be accepted as amounting to the same thing. The principle of exemption is incapacity or abnegation of making money by following a secular profession. Apastamba also includes in his list a Sudra, who lives by washing the feet, and also blind, dumb, deaf and diseased persons (as long as their infirmities last) and lastly all those to whom the acquisition of property is forbidden. Vasistha as has been pointed out above exempts grass, forests and the like from taxation; but adds that something may be levied from those who live upon them. This is probably the origin of small grazing fees and little royalties emblematic of the king's sovereignty,

IV. THE OBLIGATIONS OF THE FISC.

19. We now come to the obligations on the King's purse. One characteristic obligation of the fisc is to re-imburse the amount of stolen property if not recovered. It is practically a penalty on the king for failure to perform the duty of protecting the property of his subjects: or, as we should now call it, a state insurance against burglary and robbery. The practice obtains in some Indian states, but the obligation is thrown on a class of professional thief-catchers or tracers as they are called, who receive special fees by way of insurance *primia*.
20. The revenues of the king are further burdened with the duty of feeding the impotent and the lunatics,—for the reason as Vasistha puts it, that the king is their heir—all learned Brahmins who have no other occupation and non-Brahmins who are unable to work and also all those who are free from taxes being otherwise unable to make their livelihood, such as widows, orphans, needy students and the like.
21. Apastamba has a sublime rule on the subject. "Let no one in his realm suffer from hunger, sickness, cold or heat; be it through want or intentionally." This clearly points to a broad humanitarian obligation of public relief of the poor, the sick and the homeless. I interpret this as an absolute clause

without any limitation as to caste and creed, and do not think that the word Brahmin read in the text by Haradatta and adopted by Dr. Bühler is a warrantable insertion. It is not necessary for a proper understanding of the text; and the place of emphasis given to the word 'any one' puts the meaning of Apastamba beyond the shadow of a doubt. Haradatta commenting on the expression 'intentionally' gives the following illustration. "If any body is to be made to pay his debts or taxes, then he is to be exposed to cold or heat or to be made to fast until he pays." That there was at one time a practice of this kind in which the lower subordinates largely indulged is beyond doubt and Apastamba's rule directs to put an end to that cruel method of enforcing payment. This is quite in consonance with the text without reading the word Brahmin in the text. It would be almost unmeaning with it, because a Brahman as we saw above was exempt from taxation. There is no doubt Manu vii. 134, a rule to feed a Srotريا Brahmin, and it is possible that Haradatta makes the insertion to bring the rule in a line with it. But in that rule there is nothing of intentionality and there is nothing in it of heat and cold. The truth seems to be that Apastamba's rule is entirely different and contemplates an obligation all-

together distinct from the one which Manu indicates in vii. 134. I think, therefore, we must give credit to Apastamba for the humanitarian rule which he can well claim according to all legitimate canons of interpretation.

The sublimity of the clause is beyond dispute, and, forestalls by no less than two thousand years and more, the modern view of state and state-relief. The clause sets out in clear language, one of the truest objects of political organization. The civilization of a country or a nation ought really to be measured not by the number of its dreadnaughts or battalions, but by the provision made under it for the relief of poverty and distress in any form whatever. The rule of Apastamba is the canonical authority, in choice language—one is simply struck with the linguistic beauty of the aphorism under discussion—for providing poor relief, lunatic asylums, public hospitals, old age pensions and work houses and special famine relief. It ought to be inscribed conspicuously in letters of gold, in the offices and bedrooms and not less the dinning halls of kings and ministers, all over the world, and literally enforced in practice as an essential feature of internal politics.

V. THE BRAHMIN AND THE EXCHEQUER.

The Brahmin looms largely in this part also

of our subject. He heads the list of the non-taxables and he is according to Manu to be kept free from starvation. So not only does he not contribute a single pie to the king's purse, but claims immunity from starvation at the expense of the king. He is a perpetual guest of the king or the community, and the community feeds him, clothes him and finds money for his social engagements. A monstrosity indeed!

And yet if we concentrate our attention upon the fact that the Brahmin meant by these texts, is not the ordinary Brahmin as we know him now, the Brahmin who has taken to unlearned pursuits, but a really learned Brahmin devoted to letters and spiritual life, the self-restraining self-denying instrument of preserving in his memory the tremendous store of Indo-Aryan learning of the day, and of propagating it selflessly to generations of his country men; when we fix our attention upon this fact the sense of monstrosity transforms itself into a sigh of relief that the education of the country has been after all provided for. The term used is *Srōtriya* everywhere, except in Vishnu where it must mean so, and a *Srōtriya* is defined to be a Brahmin who is proficient in learning, and follows the occupations proper to a Brahmin and no other. Chief among the duties of the

14.

Brahmin we must now remember was the giving of education to the youth of the country. Every Srotriya Brahmin was thus an educational institution; and the privileges accorded were only another form of state subsidy in favour of education, which was free and compulsory for the Aryan of every वर्ण in our society. And the Brahmin was under an obligation to teach not only letters but the professions also.

Every true Brahmin then was thus a grant-in-aid institution for the education of the youth of the country. He was also a colleague of the king in so far as it was his duty to teach the duties which the king was to enforce. Between the two, the Brahmin had the higher function and surely deserved high privileges.

It was therefore nothing beyond a deserving subsidy which the community or the king as representing the community paid to the Brahmin in the shape of exemption from taxes, and an assured maintenance.

We may be reminded here of the special privileges accorded to the true Brahmin in respect of the treasure-trove found by him. If he was the finder according to Gautama he took the whole of it, if only he was true to his profession and not otherwise.

If found by the king the Brahmins got half of it. In fact it was to be looked upon as a windfall which must be utilized in the encouragement of Learning and Education.

Manu has a further rule to which reference must be made. If the Srotriya is to be maintained at state expense he is not to be allowed to remain idle. The following rule speaks for itself.

“Having ascertained his learning and the purity of his conduct, the king shall provide for him means of subsistence, and employment in accordance with law and shall protect him in every way as a father protects the lawful son of his body.”

We may here recapitulate the general position of the Brahmins, his duties, his obligations, and if he wanted to enjoy his privileges, his disabilities also. We have seen that he shares with the king the responsibility of maintaining the moral order of the kingdom. He discharges this duty by devoting himself entirely to the preservation and continuation of the literary achievements of the community, involving a hard mental strain. He shuts himself out from every profession, and is moreover under an obligation to keep

- himself well versed in the technology of them all to enable himself to teach his disciples, of the various *varnas*. He was thus the great educative agency. As however the supply of priests and teachers exceeded the demand, other professions were thrown open to him; but then the theory is, that he lost the privileges under discussion. Moreover stringent restrictions as to the choice of profession were imposed upon him which meant that simple maintenance as distinguished from money-making was to be his aim. At first officiating at a sacrifice and voluntary gifts, were the only two sources of income provided for him: and to make any regular income from teaching was discouraged for a long time.
22. Canonical law allows the Brahmin to live the life of the Kshastriya, that is a life of armed service, in the absence of the inability of his normal occupation to provide for his wants. This however meant throwing himself in competition with the armed and politically powerful population of the country and as usual it was no easy matter. Therefore the profession of the third *varna*, agriculture and trade is thrown open to him; but in the first case he is not to employ himself personally and in the other cases he has been overwhelmed with significant restrictions. Apas-tamba puts the whole thing very tersely when
- 23.

in I 7-27-3-4, he says, "he shall not go on handling for ever in the direction and shall stop as soon as he gets a competence, or his lawful occupation." Throughout then the scheme appears to be that the Brahmin shall never divorce himself from his intellectual and spritual pursuits and exercise; and he is always to keep himself alive to the law which commands where his real duties lie, and to where he is required to return as soon as favourable circumstances recur.

If therefore the Brahmin is the special object of public favour, it was understood so early as that by the Indo-Aryan community that learning and piety, freedom from worldly ambitions and single-minded devotion to the interests of Law and Literature, of Religion and Science, deserved such public favour. It was also understood that the community was always in need of men who devoted themselves to these pursuits and therefore they deserved every encouragement. Let us therefore be cautious in accepting the interpretation which seeks to explain as a heartless and wanton favouritism, what was really a deserving tribute to high learning, special culture, and simple life devoted to the cultivation of letters and to the education of the community, a life in fact of immense public usefulness.

CHAPTER VI.

THE EXTENT AND CHARACTER OF THE
KING'S AUTHORITY.

I. THE VILLAGE COMMUNITY.

The above gives in an outline, the main features of the office of the king. However great and powerful a king may be, he is unable single-handed to do justice to the high office; and therefore he has to keep himself provided with ministers and agents at the head-quarters and in the districts, over towns and in foreign countries. And while all these, adequately equipped morally and intellectually, will do their appointed duty, the king is to direct the whole machinery as the chief custodian of his peoples' life and property and of their material moral and spiritual interests; responsible to God and Man for the due discharge of his sacred trust.

The administrative unit, then, as until recently, was the village. Our village was a corporation with its own laws, its own tribunals and its own administrative procedure. The officer of the king was of course there; but in those days he was nothing better than the symbol on the spot, of the protecting arm of the king; with the power—a very limited one—of interfering in cases of disorder ~~only~~ and

of collecting for the king the annual tax according to custom, from the village proprietary. Short of this, the village corporation was a self-governing 'republic' with common property and common interests, under the rule of old customs, self-made and self-adjusting, judged by self-created tribunals as long as there was no occasion for an appeal to the king's officers.

Ref:1. Indications are not wanting in the old records of our country, from which to imply the existence of antonomous village communities from times immemorial. The king, as we have seen above, is asked always to respect the laws of the localities, guilds, castes, families, and the like: and when he is called upon to interfere, his officers are confined merely to an investigation with the help of assessors drawn from the class to which the parties belong, and to a restoration of right relations between the parties concerned.

The autonomy of the village extended both to the landed property and to several matters of internal administration. The existence of these village townships continued unaffected until superseded by the highly centralized government during the early days of British ascendancy: and it was a subject

of serious study for the British Administrators whose lot it was to consolidate the British Rule in Indian territories immediately after their acquisition.

“A village” says one high authority “geographically considered, is a tract of country comprising some hundreds of thousands of acres of arable and waste-land; politically viewed it resembles a corporation or township. Its proper establishment of officers and servants consists of the following descriptions. The *Polail* or the head inhabitant, who has the general superintendence of the affairs of the village, settles the disputes of the inhabitants, attends to the police, and performs the duty of collecting the revenues within the village, a duty which his personal influence and minute acquaintance with the situation and concerns of the people renders him best qualified to discharge; the *Curnam* who keeps the account of cultivation and registers everything concerned with it; the *tolliar* and *tolle*; the duty of the former appearing to consist in a wider and more enlarged sphere of action, in gaining information of crimes and offences, and in escorting and protecting persons travelling from one village to another; the province of the latter appearing to be more immediately confined

to the village, consisting among other duties in guarding the crops, and assisting in measuring them; the *boundary man* who preserves the limits of the village, or gives evidence in respect of them in cases of dispute. The *Superintendent of tanks and water courses* distributes the water therefrom for the purpose of agriculture, the *Brahmin*, who performs the village worship; the *Schoolmaster*, who is seen teaching the children in the villages to read and write in the sand; the *Calendar Brahmin* or astrologer, who proclaims the lucky or unpropitious periods for sowing and thrashing, the *Smith and the Carpenter* who manufacture the implements of agriculture and build the dwelling of the Ryot; the *potman* or the potter; the *washerman*, the *barber*; the *dancing girl*, who attends at rejoicings, the *musician* and the *poet*." "These officers and servants generally constitute the establishment of a village; but in some parts of the country, it is of less extent, some of the duties and functions above described being united in one person; in other it exceeds the number of individuals which have been described.

"Under this simple form of municipal government the inhabitants of the country have lived from time immemorial. The boundaries of villages have been but seldom

altered, and though the villages themselves have been sometimes injured, and even desolated by war, famine and disease, the same name, the same limits, the same interests, and even the same families, have continued for ages. The inhabitants give themselves no trouble about the breaking up and divisions of kingdoms: while the village remains entire, they care not to what power it is transferred, or to what sovereign it devolves: the internal economy remains unchanged, the potail is still the head inhabitant, and still acts as the petty judge, and magistrate and collector, or renter of the village."

The above has reference to tracts of the Madras Presidency. The same story was recorded in the investigations of Bombay, the Punjab and other provinces, except Bengal where owing to the excessive predominance of Mahomedan rule the old landmarks had well nigh disappeared.

Sir Henry Main sees in the phenomenon the early history of the Teutonic or the Scandinavian village-community. * "There is" he says "the arable mark divided into several lots but cultivated according to minute customary rules binding on all. Wherever the climate admits of the finer grain

* Vide for Henry Main's Village Communities ps. 107-122-23.

crops, there are the reserved meadows, lying generally on the verge of the arable mark. There is the waste or the common land, out of which the arable mark has been cut, enjoyed as pasture by all the community *pro-indiviso*. There is the village, consisting of inhabitants ruled by a despotic *pater-familias*, and there is constantly a council of government to determine disputes as to custom."××××
 "The headman is often hereditary but is sometimes described as elective; the choice being generally however in the last case confined in practice to the members of one particular family, with a strong preference for the eldest male of the kindred, if he be not specially disqualified." "In those parts of India where the village community is most perfect and in which there are clearest signs of an original proprietary equality, between all the families, composing the group, the authority exercised elsewhere by the headman is lodged with the *village council*. It is always viewed as a representative body and not as a body possessing inherent authority, and whatever be its real numbers it always bears a name which recalls its ancient constitution of Five persons.

Such then was the village community, which co-operated with the Head-quarters in maintaining peace and order, and in collecting the

king's revenue. This with the arrangements at the head-quarters and the special arrangement for large towns, completes the picture of the administrative machinery under which our ancestors more than three thousand years ago, lived and thrived.

II. CHARACTER OF THE KING'S AUTHORITY.

We shall recall once again the canonical idea of the function of government or rather, the duties of the kings, with a view to ascertain the character of the king's authority with respect to administrative and legislative interference and to the imposition and collection of taxes. His main duty is to protect his kingdom and destroy its opponents. Now protection is either preventive or remedial. By a system of police stations and district governors, the preventive part of his duties is organized. The remedial protection consists chiefly of the administration of justice, a subject with which we deal in the next chapter. He maintains peace and order and leaves the routine of administrative functions to the village council in villages, and to municipal caste and trade associations in the towns: his officers interfering only in cases of emergency.

Ref: 1. He is to respect the laws of these local bodies, and when he has to make laws, he is to see that they are not inconsistent with the

customary laws of the bodies concerned. With the foreign policy of the king we are not concerned in our present study.

The king then is the head of a number of small republics or townships, with its own executive and judicial government, each independent of one another. The village community managed its own affairs upto a certain limit; the tradeguilds, castes and families as well; and the king formed if the expression is permissible, the Residuary Government, assisting the smaller bodies whenever they needed assistance, and protecting them when required against evil-doers of all sorts, against internal disorders due to breaches of civil or domestic law, against exhibitions of passion resulting in criminal offences, and against the foreign enemy. The king was also to maintain, as far as the necessities of the time required, the economic divisions of functions so as to prevent undue or unequal competitions and also inhuman exploitation of labour by people in power; and more than all it was his duty to maintain the Brahmin population in a condition of absolute freedom from want; from cares and troubles of economic life: and this, as we have seen above not as a matter of favour but for the reason that the king was to look upon every Brahmin home as an educational institution which the

state was bound to help when the community failed to keep it above the barest want. Education was to be fostered as a matter of preventive protection. The king was always interested, besides, in keeping the Brahmin, the educationist of the country, on the side of Peace and Order.

2. Thus 'Protection' is the one word which sums up the duties of canonical Government, and the king's right to impose taxes was his right to the wages of kingship, contributed by the community for the support of the office and dignity of the king. There are plenty of injunctions in the texts pointing out how oppression in any shape whatever, and failure to protect the weak against the strong was subversive of the fundamental law of kingship. We will cite a few of them.

"That Monarch" says Manu "whose subjects are carried off by robbers from his kingdom, while they loudly call for help, and he and his servants are quietly looking on, is a dead and not a living king."

"The highest duty of a Kshatriya is to protect his subjects, for the king who enjoys the rewards just mentioned is bound to discharge that duty."

Manu vii. 143-144.

An old text cited by Gautama is very significant upon the point. The king is entitled to his share, if or as long as, he keeps to his duty. धर्मस्थोऽशभाग् भवतीति हि विज्ञायते implying, not otherwise. If that is what the text meant, and it is perfectly consistent with the entire scheme of canon law, it is our ancient counterpart of the theory, underlying the annual vote of the king's supply, in the Imperial Parliament of Great Britain and Ireland. The supplies would be voted if everything were alright with the king and his Government; or else the Government would be furnished.

We have seen that one of the obligations of the fisc is to restore to the owner, the property stolen by thieves or robbers. The taxes are thus a kind of premia for state insurance against burglaries and dacoities also. We do not stop to discuss the merits of the arrangement at this point, but we may be permitted to observe that it indicates clearly the obligation of the king and his police force: not a mere investigation with the object of bringing the offenders to justice but insurance against loss. The king was not above obligation. If he received taxes by virtue of his position he was bound to restore lost properties, or else he was to be considered a 'dead king' in the words of Manu.

We have also seen how the idea involved in the term 'protection' has softened the taxing powers of the king. We saw the rule as to the taxation of articles of merchandise. It is *Manu* vii 127. We shall quote it here to refresh our memory.

"Having well considered the rates of purchase and of sale, the length of the road, the expenses of food and condiments, the charges of securing the goods, having considered all these, let the king make the traders pay their duty." And the following rule follows:

"After due consideration the king shall always fix his duties and taxes in such a manner that both he himself and the men who do the work may receive their due rewards."

The first of these rules is adversely criticised by a historian of some authority. (*Talboys Wheeler: History of India Vol. II.*) To represent a rule, the equity of which is beyond question, as an instrument of oppression, is the climax of perversity to say the least. One can understand such criticism as this—that the rule is impracticable or the like; though an officer of Wheeler's position cannot but understand that it is not impossible to ascertain these things, where the rulers and the ruled belong to an organic state, where sympathy is the keynote

of government and where both care for a higher life that looks upon the good things of this world as only a means to a higher end. And is not the British Government actually calculating all this where it cares to lay down the principle? What are the elaborate Survey and Settlement Rules intended for? Wheeler thought that in those primitive times such subtleties were impossible and mentioned by the wily legislator to create occasions for vexatious interference. The mistake of the view is apparent on the face of it. The past in India is well-known for its devotion to truth and transparency of character and such a view as that propounded by Wheeler is utterly inconsistent with the fundamental characteristics of the times we are speaking of.

What was the principle of taxation and the consideration for which it was allowed to be levied? Protection is again the word; and affords ample consideration for a moderate taxation which has to be so adjusted as to leave due rewards for all concerned. The land dues of the King stand on the same footing. *Are they rent or tax?* The author of the Vyavahara Mayukha propounds the following propositions:—

4.

“Similarly conquests and other modes for a Kshatriya and the others for Vaisyas and Sudras respectively. In conquest also where there is the ownership of the conquered in houses, lands, moneys, or the like, therein only arises the ownership of the conqueror, but where the conquered has a right to taking taxes only the conqueror has even the same and no ownership. Therefore it is stated in the sixth book of the Purva Mimamsa: “The whole earth cannot be given away by the king of the world, neither the whole *mandal* by the king of the dependency.” The ownership in each village, field or the like of the whole earth, or the dependency belongs solely to the Bhumikas or landlords.* *The ruler has only to take the taxes.* Hence in what is now technically called the gift of land, the gift of the soil is not accomplished, but only a gift of due allowance is provided. But in purchases made from Bhumikas or owners of the soil even ownership in houses and soil accrues. Therefore to the giver of such land there is also the fruit of the gift of the soil.” †

* Public agricultural lands are at present in no civilized countries a great source of revenue. The apparent exception in Russia and British India are not exceptions because the land in one case has become, and in the other case, never ceased to be, in some sense, the property of the peasantry, and thus revenues levied by Russian and Indian authorities are not to be held as rents paid by tenants, but as taxes paid by subjects.

Political Economy: Devas p. 586 and references cited there.

† Mandlik's Vyavahara Mayukha. P. 35.

III. THE SOCIAL SYSTEM.

This theory of taxation affiliates itself as we saw above to the view of political rights and obligations which makes the king a servant of the people whose duty it is to protect them from internal disorder and external foes. The taxes are the king's wages, not for personal use but for purposes of state, the latter forming the first charge on the revenues, raised by the king. The protection besides is not nominal but substantial, at least so far as against thieves and robbers. Not less substantial is the protection which is enjoined against ignorance and want, ample provision being made for education by subsidising, wherever necessary, the Brahmin, whose duty has been laid down to be, to teach one and all in one and all the subjects of theoretic or practical importance; and train people in intellectual, moral and physical discipline of a high order. There was a compulsory system of education for the entire Aryan and Aryanized community, with instructions in the particular profession on which each had to depend for his livelihood, superadded; so that when the boy came out of his teacher's home, or school as we should now call it, he had something on hand to rely upon for his maintenance. The fisc as we have also seen had the obligation of keeping people from want of every kind, and

charities for the poor, the sick and the deserving were no less enjoined then than now.

But, throughout, we must never lose sight of the fact that the principal aim of the political system laid down, has been, to give, subject to some general rules based on considerations of hereditary tendencies, to the people, a free scope to attain their own good in a manner not inconsistent with the highest good that Man is here to achieve; and when there has to be made a sacrifice, the rule is, 'sacrifice as little as possible of spiritual good, to achieve the temporal ends of human life: which ends are not to be ne-

times associated with territorial exclusiveness; but the entire onus of maintaining the territories was left in the hands of the king and his *Varna*-fellows. Government in its every day detail was mainly local and sectional; and when the king passed laws they were mainly for groups of men and not so much for whole territories. The territorial element of state was thus kept in the back-ground; and as the people were secure in getting their own laws respected and recognized by the powers that be, they had no general or living interest in the territoriality of the state. We had personal laws, personal loyalty, personal service, and personal duty; and the people at any rate had no commanding conception of the state as comprising a certain territory ruled over by a single central government. The reason of it is to be found in the full recognition of self-government for the village communities and townships and for contractual relations for trade-guilds; and a full recognition also, of family caste and personal self-governments of all kinds. It was a case of thorough going individuation, recognition of every possible group as a self-contained and self-sufficing unit, as a state as it were with its own laws and its own instruments of internal government; the king exercising what I have called the resi-

duary authority, with the object in the main of keeping together in their personal relations these different groups, and keeping them true to their own laws. These states without territories, were so many civil governments, secure in their safety from internal or external foes whom the king and his Varna-fellows, thought it their duty to face; a duty for which they thought it a matter of humiliation to demand co-operation from members of the other Varnas. The other Varnas were however enjoined to help them in certain critical circumstances.

5.

It would appear, however, that in the exercise of the residuary authority the king was absolute in the canonical scheme of government and there was a tendency to concentrate the entire authority in the hands of the king and his ministers. The evil effects of such an arrangement were perceived even in those early days, and Vasistha has a characterestically outspoken passage on the subject. 'The king' he says 'must see the business of the state in association with the citizens' the proper significance of which we shall attempt to understand when we notice the text which belongs to the chapter on the administration of justice and to this subject it is now time for us to turn our attention.

6.

CHAPTER VIII.

ADMINISTRATION OF JUSTICE: GENERAL.

I. LAW AND LIBERTY.

We have seen that the primary duty of the king is the protection of the weak against the strong. The tradition from the Mahabharata quoted above has further shown that the people make their own laws, and the king enforces them. The enforcement of law against those who violate it is the function of justice; and the king is the chief judicial authority of the kingdom.

Early writers have a very simple but effective statement on the subject. Thus Gautama has the following:

ef: 1. ‘‘His (the king’s) is the administration of justice. There, the Vedas, the institutions of the sacred law, the Angas and the Puranas are the authority. The laws of countries, castes, and families, which are not opposed to the sacred records are also authority. Cultivators, traders, herdsmen, money-lenders, and artisans, have the authority to lay down rules for their respective classes: Having learned the (state of) affairs from those who in each class have authority (to speak he shall give) the legal decision. Reasoning is a means for arriving at the truth. Coming

to a conclusion through that, he shall decide properly. In case of conflict, he shall learn the truth from men old in learning, and give his decision accordingly.”

These rules of Gautama may be characterised as the Magna Charta of Aryan liberty. The same spirit breathes through the dicta of all writers on the subject. They lay down distinctly, ‘We shall always have our own laws; the king will not be required to force his will on the people. He will of course rule and govern us but the laws shall be our own and self-made.’ In cases of conflict of evidence as to the law on a particular point, the authority of saying what the right law is, belongs not to the king but to those old in the learning of the Vedas. By this term be it said, are not meant Brahmins only, for, in those days learning in the Vedas was availed of by all the three classes of the twice born. In so far therefore as liberty implies the power of making laws, a full measure of it is reserved to the people or rather to the various self-governing groups of people by the canonical scheme of Government.

This general duty of the king to administer the people’s own laws is endorsed

2. by all the Smṛitikaras, ¹ Apastamba, ² Vasistha, ³ Baudhayana, ⁴ Vishnu, ⁵ Mann and ⁶ Yajñavalkya. There is in Mann's rule an express mention of *Janapada Dharma*, which is interpreted to mean laws of 'districts' thus furnishing evidence that at times certain people residing in certain area had laws applicable to themselves in those areas: unity of intent, chances of agreement, and possibilities of enforcement being the guiding considerations in the settlement of the extent of areas of such local laws. The following rule of Katyayana look almost like a modern rule; or put in another manner has not yet been superseded. "Disputes between inhabitants of countries, cities, colonies, towns and villages, among themselves should be decided by their own custom", which is only another name of self-made law; 'but as between them and others according to law.'
- 3.

Another fundamental principle which vouchsafed our liberties to us under the monarchical form of government, apparently so autocratic, is to be found in the rule which prevented the king and his officers from themselves instituting legal proceedings or from hushing up such as have been brought before the law-officers already. This left the king and his men mostly untroubled with the

¹ I II 15-1, ² XIX 7, ³ I 2-1-8, ⁴ III 3, ⁵ VIII 41, ⁶ I 360.

private affairs of men; and made room for them to come to understanding among themselves with respect to their grievances against one another. The rule on the subject is germinally seen in Gautama * where the litigant is asked to seek the judge, and not the judge the litigant. But Manu makes the prohibition clear (Manu VIII 43.) The king, is not to instigate creditors, for instance, to harass a man who has lost his favour. We do not quite know whether this ancient rule, included both civil and criminal proceedings. Having regard to the fact that criminal law was for a long time considered as much a matter of private concern as the civil law, the rule might have been at first meant to apply to both kinds of litigation. Medhātithi does not raise the question, but Sarvajna-Narayan excludes criminal matters from the rule, and adds emphatically that criminal matters may be investigated by the king the absence of complaint, notwithstanding. It would not be incorrect to surmise however that in the earliest stage the rule included both civil and criminal offences, for, Gautama (II. IV. 29.) includes in his rule, such actions as concerned draught-oxen, women, the birth or procreation of offspring; the latter two having a distinctly criminal meaning. It therefore marks a stage

* II. IV. 27.

in the progress of civilization when Manu's rule came to be interpreted as being confined to civil matters only, and as permitting the initiation of criminal proceedings to the king. The negative clause of the rule is equally significant. "He shall not defeat a cause already instituted." The net result is that under the canonical law, the people were allowed to exercise their free will in deciding whether they will initiate legal proceedings at all; and where the will was exercised the law was permitted to take its own course.

II. THE KING-IN-COUNCIL.

A third guarantee of our liberty is to be seen in the constitution of our courts of justice. The king is not in the first place the sole judge in judicial matters. "He shall enter the court attended by Brahmins and Ministers of Justice." We then find directions about the organization of the court of Justice, an assembly of three *learned* Brahmins to assist the king, in deciding disputes. Yajnavalkya's description of the Sabhyas is fuller and clearer. "The king shall then appoint the Sabhyas, Jurors, or Members rather, of the court, who are furnished with Learning and Study, who know the law (its real soul) who are truthful and who, moreover, are impartial to friend and foe alike." Yajnavalkya, it may be noted, does not say that these members must be Brahmins, and seeing that learning was

in cases of doubt and difficulty to give their true opinions; custodians as it were, of law, living libraries bound to tell the truth when required to tell it. Katyayana further mentions that a few *vanik* (merchants) must be included in the assembly of justice; merchants, being men of birth and character well advanced in age, and of blameless record, wealthy and charitably inclined. And Gautama, and Vyas quoted by Nilakantha, (V. M.) distinctly enjoin that disputes of traders, artisans, agriculturists and actors should be decided by jurors drawn from their respective classes. And Brihaspati's rule, that "Disputes of those who live in forests shall be decided by juries composed of men living in forests; disputes of soldiers by juries of soldiers, and of companies of merchants, by assemblies of merchants, is an Indian counterpart of the modern rule of Western administration of justice, that a man shall be judged by his own peers, extended to the people at large.

If the king does not personally look into cases, he is asked to appoint a Brahmin of all-round attainments to co-operate with these members of the judicial assembly. And Narada hits the mark when he lays down that the Pradvivaka is the responsible chief of the court. He is the *Prat*, the president, who questions the plaintiff and the defendant, and

11.

discusses the points for decision with the members of the court. The modern Sessions Judge sitting with jurors does the same. And Narada quoted in the Mitakshara, further requires that the king shall always follow the advice of the Pradvivaka. The king can do no wrong acting under the advice of his responsible ministers, so says a fundamental maxim of the British Constitution. In judicial matters at any rate Narada's rule discharges the king of all responsibility for decision, required as he is, to follow the advice of the Pradvivaka. The members of the Judicial Committee of the Privy Council arrive at their decisions independently of the King and advise his Majesty accordingly.

III. SOCIAL COURTS OF JUSTICE.

We see in this description of the constitution of our courts of justice a growth, an evolution, where-in the king is by degrees made to associate himself with Brahmins, the ministers, the jurors, and finally the Pradvivaka, and asked to sink his personality in the last who is constituted the active president of the court; a slow and steady progress from the personal rule of the king to the constitutionalism which makes the decision of the Pradvivaka-in-council, binding upon the king.

These are the courts of the king and constituted by him. But we have seen that the

groups into which the community was divided were all self-governing, had self-made laws, and had their own administration of justice too.

12. Yajnavalkya therefore divides judges, Vyavahara-Drashtas the investigators of justice into four classes *viz.* (1) The officers appointed by the king, (2) The Pugas, (3) The Shrenis, (4) the Kulas. The Pugas are communities of people residing in one place, a village or town for instance belonging to different castes and following different occupations; neighbourhoods as we may call them, territorial units irrespective of caste, creed or occupation. The Shrenis are communities of men following the same or similar occupations belonging to the same or different castes; occupational units irrespective of caste. The Kulas are aggregates of relatives and castemen, the caste proper as a legislative unit and judicial tribunal. Of these according to Yajnavalkya the first is stronger than the second and so on in order. The result is that a man aggrieved with the decision of the king has no appeal to his township, trade-guild or caste-court; and no appeal from the decision of the town-ship to the trade-guild and so on. But appeal might lie from the trade-guild to the town-council and from the latter to the king's court.

IV. THE SPECIAL COURT OF APPEAL

Finally Narada allows a special appeal to the King personally from decisions of the

King's officers. Then the king organizes a new assembly and hears the appeal. If the appellant fails in that appeal he is to be fined and if he succeeds the councillors of the former court undergo a like punishment !

Thus constituted the courts are to decide cases between parties according to a settled procedure. But what is a case? We answer the question in the next chapter.

CHAPTER VIII.

THE JUDICATURE.

I. WHAT IS A CASE?

Ref: 1. What is a case? "The subject matter of case is that conduct of others, contrary to the rules of Smriti and approved usage, attacked by which, *information* thereof is given to the King by the party aggrieved". Narad puts it more comprehensively when he says 'Vyavahara arises when Dharma or Law is violated in one way or another'.

Now we have discussed the question What is Dharma, in chapter II above and here we will do if we briefly recapitulate the main position, with a view to understand what is meant by the expression, 'Violation of Dharma

Dharma as we have seen, is that by which a weak man can rule the strong the ruler of rulers; and also the protector of the rulers too: the ruler and protector of humanity, conceived as an organism moving forward to progress and civilization. It can well be identified with the moral law which makes for harmony, for peace and for progress, mitigating the rigour of the strenuous life of struggle and rivalry expecting each individual every moment of his life to remember that he is but a minu

atom in the vast organism, which it is his privilege to serve, and in serving to perfect himself, and realize his true Self. That is the abstract idea of Dharma. Concretely speaking, it is a command, consistent with one's *true interest*. The command is usually addressed to the individual or to the unit commanded, and may be either positive or negative. Such commands are found in our sacred-books; and the Vedas as the primordial sacred book of the Indo-Aryan portion of humanity, is the chief and primary source of Dharma. The Smritis are codes of such commands, and being records of their memories by great and good men are authoritative. The third source of Dharma is the actual conduct or custom and usages of the *great and good and holy* men.* Apastamba has a definition which while including the latter two, adds a third source viz. agreement or convention of those who are learned in the Dharma. Manus mentions the satisfaction of one's heart among the necessary conditions of Dharma. It is rather difficult of interpretation. It is ordinarily explained as meaning 'Satisfaction of your self must be your guide

* 'Holy men' in Manus expression appears to involve the consequence that whereas the previous writers insisted upon Vedic learning and allegiance to Vedic civilization as constituting an essential qualification of men whose conduct or opinions were to be law, Manus would give the liberty to any 'holy man' regardless of this qualification.

where option is permitted.' According to this interpretation this is no additional source or antecedent condition of Dharma but only a rule of choice between two optional commands. But an option is always allowed where authorities of equal grade conflict; and we would be doing injustice to Manu, to say, that all he meant was that our satisfaction should be our guide where our choice was the element which invested the commands in question with authority. 'Satisfaction of one's self' must therefore have a substantive significance; and it is to be found by reading in it the moral and æsthetic approbation of the soul. It would be in this sense the ancient and religious counterpart of the canon implied by the terms, 'not immoral or repugnant to æsthetic sense.' The clause has been a great reforming agency in the civil and criminal, not to say religious law in our country. In the sphere of Civil law, it has reformed the ancient law of souship and several instances of the kind can be cited, as due to the beneficent effects of the operation of this clause. Dharma is thus a command, which is Artha, consistent with one's true interests. It is a command of which the sources are the Vedas, Smritis, the convention of the learned, the customs of the self-less and of holy men; pro-

vided it is not immoral or repugnant to one's moral and æsthetic sense.

According to Yajnavalkya the entire standard literature of our civilization is the source of Dharma, and it is no violence to his spirit to say that the trend of his expression would justify the view that everything which is a source of knowledge is a source of Dharma. He mentions the Vedas with their limbs and growths, the Puranas, the Philosophies, and the Dharma Sastra proper. It would mean that he desired not only that all should be consulted, but also co-ordinated and harmonized. And, with the object of developing the individual

and difficulties; the Sastra provides for them the organization of assemblies of four, three or even one, learned in the law, free from the passions and prejudices which warp one's judgment. The opinion of such an assembly, combining as it will do, all the sources above mentioned, is a binding authority in all cases where reference to it is desirable or necessary.

Dharma thus comprehended, through these various agencies; is what every one is expected to follow; and it must be violated in one way or another in order to give occasion for the information, which gives the king as well as the various social tribunals the jurisdiction, to interfere in the otherwise free life of the individual.

II. LAW AND POLICY.

It may be noted, at the same time, that *Dharma* as apprehended through all these agencies, will still be no *Dharma* if and when it is not *Artha* (अर्थ); if and when it is not consonant with the best and the highest interests of the individual or the portion of humanity in reference to which the command has been made. Such a command, whatever its source, even the *Sruti* not excluded, is no *Dharma* and need not be obeyed, *ex-hypothesi*. In all cases of conflict, however, there is according to Manu, an obligation to reconcile

the two, धर्म and अर्थ, as far as may be. The rule is 'knowing what is consonant with the true interests of the individual or the community as the case may be, and what is not, knowing what is Dharma and what is not; let him examine the cases that are brought to him'. And the same rule is intended by Narada when he asks the King, 'to conduct the trial of cases before him, skilfully, so as to avoid carefully the violation of Law as well as of the dictates of Prudence'. When there is no chance of such a reconciliation the King is enjoined to subordinate the dictates of Prudence to the dictates of Dharma Sastra, but that again does not give a go-bye to the original definition of Dharma. And, further, as a final direction in choosing between the several dicta of the Dharma Sastra, he says "Reason must be the guide: for in such a case the decisions of the King have a strength of their own, and can overrule Dharma." And, lastly, in view of the subtlety of Dharma its direct inaccessibility and its inscrutable character, Narada in cases of difficulty, recommends a straight course. "In such a case, better go by the visible path." This is the last and it must be said, the most effective stroke in the process of the secularization of law and justice. Here are
 tions enough if precautions were :

knowing humanity and human nature as we do, to safeguard the interests of 'Policy and Prudence' against the claims of what may be technically, but not substantially, Dharma. But, as we have repeatedly emphasised, Dharma itself is synonymous in the canonical scheme with the highest and the most efficient policy, and was never meant to interfere with the best and permanent interests of the individual and the community. Moreover, Katyayana distinctly allows that an information, opposed to the interests of the town or kingdom, or disallowed by the King (as contrary to public policy) shall not be proceeded with. A violation of *Dharma* thus comprehensively understood gave occasion for a case to be launched in, before one or the other of the tribunals mentioned in the foregoing chapter. And in the power to decide cases there lay, in the hands of those social and political tribunals, the power to interpret the law, and to modify and create custom. In their hands, thus, also lay, the power, to lay down the law in doubtful difficult and unforeseen circumstances, the power extending from the most minor matters of every day conduct, to the largest civil and civic relations of the people of India, Aryans and Non-Aryans, who lived under the institutions of the *DHARMA SASTRA*.

III. USAGE-IN HINDU LAW.

5. We have seen that custom or usage is one of the sources of Dharma. The King is asked by *Vasisht* to regulate his administration of justice by *Agama* and *Precedents*. We also find that the *sutras* do not contain much detailed information on topics of Civil Law, and *Vasisht* particularly mentions that *Manu* has collected the various laws of countries families castes and tribes to suit the convenience of all. We have seen the directions of all, that these customs must be followed. *Vijñāneshvar* in his commentaries on *Yajñavalkya* makes a further statement which is remarkable. At the beginning of his commentaries on the title of Partition (including Inheritance) he says 'The texts in this section are mostly recitals of what actually prevails among the people'. And another writes of great authority, *Mitra Misra*, says the same thing of all the *Vyavahara Smritis* (texts relating to the Civil Law). For all digest-writers, consider the texts on *Vyavahara* as simply reciting the customs recognized by people' and *Nilkantha*, in the *Vyavahara Mṣūkhya* compares Civil law to grammar as being based on usage. A usage accepted by the community thus becomes Dharma (Law) and *Yajñavalkya* (I. 156) lays down how even Dharma itself if opposed to the

usages and wishes of the people is not to be practised. According of Brihaspati, 'The usages of a country tribe and family which have been introduced by the ancients should be protected, otherwise the people rebel, popular disaffection takes place, and the army and the treasure are destroyed.'

Thus it is that usage transcends Law. In actual life we find many a deviation from the rules of Sastra on many points of every day importance. Mr. Mandlik has collected the texts and precedents in an appendix to his valuable translation of Vyavahara Mayukha, setting forth the customs or usages of countries castes families and tribes accepted by the community which have thereby acquired the force of Law. It may be noted that acceptance by the community is the condition which gives them the force of Law; a condition which clearly vests in the community the power to accept or reject usages and create new ones in their stead as circumstances might demand. One great complaint against us is, we are caste-and-custom ridden. We are and we deplore it. But, in the fact, lies, at least as long as a better one is not found and established, a key to our salvation. It gives to the community the power to change its usages. At least in purely social matters in which the Law Courts

of decrees. The frame of the plaint, appointment of agent to prosecute or defend, the pleadings and their admissibility, burden of proof, the rules of evidence oral and documentary, the strength of possession and rules of limitation, qualification of witnesses, and the rules of their examination, the ordeals, and oaths; all these questions are dealt with in the Smritis and exhibit a fair perception of the necessity of adopting an efficient and settled procedure in the administration of justice. With the details of these rules we are not concerned today. Neither are we concerned in our present study with the details of the substantive law as expounded in the text-books. Suffice it to mention that the various *informations* which people brought to the tribunals were classified under the following eighteen heads according to Manu (Chapter viii-4-5-6-7) :—

7.

1. The non-payment of debt.
2. Deposit and pledge.
3. Sale-without ownership.
4. Partnership.
5. Resumption of Gifts.
6. Non-payment of Wages.
7. Transgression of compact. Non-performance of agreement.
8. Rescission of sale, and purchase.
9. Disputes between Master and Herdsmen.

10. Boundary Disputes.
11. Assault.
12. Defamation.
13. Theft.
14. Robbery and Violence.
15. Adultery.
16. Husband and Wife.
17. Partition (of inheritance.)
18. Gambling and Prize fighting.

Under these eighteen heads the different complaints were classified, and in laying down the manner in which to dispose of them, there are laid down rules of Law on these various subjects., forming the substantive Law of the Aryan Community. These rules include, such topics as the law of interest, mortgages bailment, sales and pledge, the law of master and servant, the law relating to family, and sonship including the law of adoption, the laws of inheritance and maintenance, the laws of partition and self-acquisition, and the law of *stridhan*; the rules relating to rights of minors and helpless women and widows; and lastly the law relating to the various criminal offences. Taken as a whole, they go to reveal a state of society primitive indeed in certain respects but in certain others not far removed in complexity from the society of today: the rules themselves exhibiting a studied and serious effort at building up a sound and sagacious

system of an efficient, and at the same time as far as possible, equitable social polity, calculated not only to protect and preserve, but, in the opinion of the day, tending also, to promote, the best interests of the body politic.

the king is asked to conserve the laws of the Vedic tradition, meaning obviously that these need not be Vedic either in letter or in spirit. The binding element here is 'Samvid,' compact, an agreement of 'free will'; and Manu himself takes notice of persons who having once joined in a compact get out of it, and awards a punishment for it. This punishment would appear to be more or less of a disciplinary character. Persons having voluntarily joined in compacts to which whole villages or countries or multitudes are parties; compacts, which are in fact supposed to be the basis of conduct for all, belonging to the one or the other of their respective groups: these persons are expected to carry out their own compacts; and if they did not the King would punish them. As a 'step in further organization,' the leaders, the 'speakers of the interests' of these multitudes (समूहहितवादिनः) have been given an authority to command which the followers are placed under an obligation to obey: the King, punishing them if they did not. These 'speakers' are again accorded a status in the King's Court; and the Kings are asked, to part with them, after they have finished their business not before conferring on them honours and substantial presents; and what is particularly remarkable is that the presents so received are not to be considered

as the private property of the 'Speakers' but they are required to make them over to their respective organizations. In order that there may be no mistake, Yajñavalkya ordains, "These speakers must be people who know the Law, who are pure and inavicious, and moreover, who devote their attention to public business." 'Of such 'speakers' orders must be obeyed' implying of course not of others.

II. PUBLIC POLICY.

3. So far we have seen that the whole machinery of monarchical government is devised with the object of securing to the people, self-government of the purest kind, with perfect tolerance and unqualified impartiality. In his dealing with the people the King is commanded to be soft and severe as circumstances might require; for, says the text, (Manu vii 140) 'a King who is both soft and severe is respected.' But, even in the latter case he is asked to be modest and courteous to his people, for, says, Manu, (vii 39,) in courteousness lies the safety of the King. For want of it, the text proceeds 'Vena, Nahûsha, Sudasa, Sumûkha, and Nimi lost their kingdoms. Prithu and Manu, on the other hand, acquired kingdoms by virtue of their courteousness. Concession and coercion as circumstances might require, but courteousness

throughout is thus the right policy for the King (and his officers) to adopt in his dealings with the people. We have also seen that Justice is the main function of kingship. 'He must be' says Manu pure in thought and conduct, true to his word, and must follow the rules and methods recommended by the Sastra or as we should now say, the constitution; for, by a wise King so conducting himself, and well provided with co-adjutors, can the sceptre be successfully wielded. (Manu vii 31). He is asked to be determined to do Justice in his own Kingdom, although he is permitted to be severely coercive to the enemy. He is commanded, further, to be straight-forward with friends and forbearing (and propitiating also, Manu vii 79) towards the Brahmins—the literary classes of the community (Manu vii 32). The King is to protect his kingdom and to punish the enemies of order and good-government; and if for want of foresight and out of infatuation the King crushes the kingdom, he does so at his own risk. (Manu vii iii).

The same liberal policy is recommended for a conqueror. (Manu vii 201 *et seq*) Having conquered, the King is to propitiate the Divinities and the Brahmins—the literary classes, of the conquered community, make substantial presents to the deserving and proclaim

immunity for the subjects. (Yaj. II 322). The conqueror is then commanded to learn, from the conquered King or his kinsmen, and the ministers of state and the people, their wishes as to the future, and after taking them into confidence, to re-instate a worthy scion of the family of the fallen King, and establish a constitution for the kingdom. (Manu vii 202). He should then proclaim the rules of Law that will govern them, in conformity with their own laws, and return to his kingdom after honouring the new King and his ministers with valuable presents.

the belief that he is a mere man. (Manu vii 8). He is a great Divinity in the form of Man; that is how he is to be looked upon. 'He who hates a King through delusion is destroyed without doubt, as the King himself resolves to put an end to that hatred without loss of time. The King' another text goes on 'is the sceptre incarnate.' He is the leader and ruler of men, the Guarantee of Dharma for all, young and old, created by God, for the protection and preservation of Mankind, in the belief that without a King, it would be all darkness and disintegration, in this world of erring mortals. -(Manu vii 3.)

III. ASSOCIATION OF PEOPLE IN THE AFFAIRS OF STATE.

Vasishttha, XVI commands the King to conduct the affairs of state in association with his ministeres and the citizens. Here is a text the true significance of which does not appear to have been sufficiently noticed by later writers. We do not find quite the like of it any where else. Vasishttha has the reputation of being among the earliest of our Smriti writers, and his text points to the existence of some method of associating the citizens with the King and his ministers in the administration of State-affairs. The context it may be said is rather unintelligible, and the text appears misplaced, too; 'the expression

in other circumstances,' or 'in the alternative' postulating some previous text on the method of government. It must be also said that the texts which follow are also obscure. But one thing is perfectly clear, 'राजा मन्त्रिभिः सह नागरैश्च कार्याणि कुर्यात्'। 'The King shall conduct his affairs of state in association with the ministers and the citizens.' The kernel of the text is perfectly sound and intelligible, and its significance unmistakable. It is useless to speculate why such a clear text as this is not represented in the metrical smritis, as the information in our hands on the subject is so scanty. There is no doubt however that at one time consulting the people on important occasions in state-affairs was not unusual. The Râmâyana gives remarkable illustrations. When Dasaratha proposes to appoint Râma as Yuvaraja he calls an assembly of Brahmins and Kshatriyas, merchants and agriculturists, and puts the question to the assembled people and asks their opinion. The same procedure is adopted by the ministers after the death of Dasaratha.* And, it is remarkable that a Rishi of the name of Vasishtha was the Preceptor of the family.

The failure of the Indian political system is to be traced among other things to the

with the king at the head-quarters. So far as the people legislated for themselves and decided their own cases the people were perfectly free. In judicial matters the King had his courts and his councillors and in matters executive he had his ministers, and his army of civil servants; and with full confidence in the superior equipment and moral and religious sense of the King the entire responsibility was made to rest on his shoulders. Vasishtha as we have seen above requires the King to associate the citizens with him in the affairs of Government. This may be either a record of Vasishtha's observation or his advice, but it appears that its spirit was either not thoroughly grasped or wilfully neglected. The result was that government became a monopoly in the hands of the Kshatriya class who kept their trust manfully for a long time, no doubt, but who could not hold together against external foes for want of active association of the people in state concerns. But that is another story.

IV OUR HOPE.

We have now seen the main features of the constitutional organizations of the Hindu body politic. The King is to enforce the laws thus made, thus comprehended. It is in more respects than one as free a constitution as could be consistent with

peace and order and good government for those early times. To this very day we have preserved several of the more important features of this constitution; and to this feature in the constitution of our society is to be traced the wonderful tenacity we have exhibited through these thousands of years, in the midst of numberless troubles and difficulties. In loyal submission to the central organizations, wherever they existed, our people have tried to work out their salvation by forming themselves into groups large or small, making their own laws and seeking to enforce them with the machinery that they could devise. Our constitution has made us in a way indifferent to or independent of the kingly power. We had our law-making and law-enforcing machinery. It certainly required a group of men prepared to follow their self-made laws to establish a centre of self-government. But society in our country managed to form itself into a number of self-governing groups, protected by the king. This was required, without injuring their vitality or the vitality of the principle underlying their constitution, to hold them together against internal disorder and external foes.

